LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

MAY 8 1973
MICHAEL RODAK, JR., CLERK

October Term, 1972

Docket No. 72-1504

THE COCA-COLA COMPANY, COCA-COLA BOTTLING CO. (Thomas), INC., COCA-COLA BOTTLING WORKS (Thomas), INC., COCA-COLA BOTTLING WORKS 3RD, INC., ELBERTON COCA-COLA BOTTLING COMPANY, RODDY MANUFACTURING COMPANY, WESTMINSTER COCA-COLA BOTTLING COMPANY, COCA-COLA BOTTLING COMPANY OF KEENE, INC., THE SCIOTO COCA-COLA BOTTLING COMPANY, and TEXAS COCA-COLA BOTTLING COMPANY,

Petitioners,

against

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Of Counsel:
CHARLES L. GOWEN
EDWARD WOLFE
WILLIAM A. CLINEBURG, JR.
MARIO DIAZ-CRUZ III
KING & SPALDING, Esqs.
WHITE & CASE, Esqs.

THOMAS KIERNAN
Attorney for Petitioner
The Coca-Cola Company
14 Wall Street
New York, New York 10005

GORDON B. SPIVACK
Attorney for Petitioners Coca-Cola Bottling Co. (Thomas), Inc., Coca-Cola Bottling Works (Thomas), Inc., Coca-Cola Bottling Works 3rd, Inc.
25 Broadway
New York, New York 10004

Of Counsel:
J. GUY BEATTY, JR.
LORD, DAY & LORD, Esqs.
MILLER, MARTIN, HITCHING, TIPTON, LENIHAN & WATERHOUSE, Esqs.

RANDOLPH W. THROWER
Attorney for Petitioners Elberton Coca-Cola Bottling Company, Roddy Manufacturing Company, Westminster Coca-Cola Bottling Company, Coca-Cola Bottling Company of Keene, Inc., The Scioto Coca-Cola Bottling Company, and Texas Coca-Cola Bottling Company
3100 First National Bank Tower
Atlanta, Georgia 30303

Of Counsel:
WILLIAM M. HAMES
SUTHERLAND, ASBILL & BRENNAN, Esqs.

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions, Statutes and Rules involved	3
Statement of the Case	4
Introduction	4
The Proceedings and Underlying Facts	4
Reasons for Allowance of the Writ	10
I—The Court below adopted an inflexible test of the District Court jurisdiction in conflict with applicable decisions of this Court	10
II—This case raises important questions of Federal law, concerning the proper roles of the Commission and the Federal courts in assuring the lawfulness and effectiveness of Commission adjudicative proceedings at a meaningful stage, that should be settled by this Court	15
III—The Commission proceedings, designed to alter the time-honored structure of an industry after years of judicial approval, threatens serious disruption to that industry and many of its members. This Court should exercise its power of supervision to help minimize the consequences which may flow from improper procedure in that proceeding	19

PAGE

Conclusion 22

Appendices:

A—Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit 1a

B—Opinion and Judgment of the United States District Court for the Northern District of Georgia 11a

C—Order of the Federal Trade Commission Denying Motion to Dismiss 29a

D—Order of the Federal Trade Commission Administrative Law Judge Denying Motion to Dismiss 41a

E—Constitutional Provisions, Statutes and Rules Involved 47a

TABLE OF AUTHORITIES

Cases:

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 14

Carpenters' Union v. NLRB, 357 U.S. 93 (1958) 18
Carvel, Matter of, FTC Dkt. 8574 (July 19, 1965) 6
The Coca-Cola Bottling Co. v. The Coca-Cola Co., 269 F. 796 (D. Del. 1920) 5, 6
Continental Insurance Co. of New York v. Cotten, 427 F.2d 48 (9th Cir. 1970) 21

Elmo Division of Drive-X Company v. Dixon, 348 F.2d 342 (D.C. Cir. 1965) 10, 14

Fruit Growers' Express Inc. v. FTC, 274 F. 205 (7th Cir. 1921), *cert. granted,* 257 U.S. 627 (1921), *cert. dismissed,* 261 U.S. 629 (1923) 18
Fuentes v. Shevin, 407 U.S. 67 (1972) 16

PAGE

Jewel Companies, Inc. v. FTC, 432 F.2d 1155 (7th Cir. 1970) 10

McGee v. United States, 402 U.S. 479 (1971) 11, 13, 14
McKart v. United States, 395 U.S. 185 (1969) 11, 12, 13, 14
Minnesota v. Northern Securities Co., 184 U.S. 199 (1902) 21

National Licorice Co. v. NLRB, 309 U.S. 350 (1940) 18
New Orleans Water Works Company v. New Orleans, 164 U.S. 471 (1896) 13, 21

Parisi v. Davidson, 405 U.S. 34 (1972) 11, 12, 14
PepsiCo, Inc. v. FTC, 472 F.2d 179 (2d Cir. 1972), *pet.* for *cert.* filed April 19, 1973 20
Provident Tradesmen's Bank and Trust Co. v. Patterson, 390 U.S. 102 (1968) 15, 16, 21

Shields v. Barrow, 58 U.S. (17 How.) 130 (1854) 15, 18
Sinclair Refining Co. v. FTC, 276 F. 686 (7th Cir. 1921), *aff'd*, 261 U.S. 463 (1923) 19
Sterling Drug, Inc. v. FTC, 450 F.2d 698 (D.C. Cir. 1971) 10

United States v. Glaxo, —— U.S. ——, 41 U.S.L.W. 4195 (Jan. 22, 1973) 21
United States v. Hearst Corporation, —— F. Supp. ——, 1972 Trade Cases ¶74,161 (S.D.N.Y. 1972) 19
United States v. Northern Pacific Railroad Co., 134 F. 715 (8th Cir. 1905) 19
United States v. United Shoe Machinery Co., 247 U.S. 32 (1918) 17
United States v. United Shoe Machinery Co., 222 F. 349 (D. Mass. 1915), *aff'd*, 247 U.S. 32 (1918) 18

PAGE

Western Union Telegraph Co. v. Pennsylvania, 368 U.S. 71 (1961) 13, 21
Wolf Corporation v. SEC, 317 F.2d 139 (D.C. Cir. 1963) 13, 14

Constitutional Provisions:

Fifth Amendment to the Constitution of the United States 3

Statutes:

Administrative Procedure Act:
Section 10(c), 5 U.S.C. §704 3
Section 10(e), 5 U.S.C. §706 3

Federal Trade Commission Act:
Section 5, 15 U.S.C. §45 ..... 3, 14

Judicial Code:
Section 1254(1), 28 U.S.C. §1254(1) 2
Section 1331(a), 28 U.S.C. §1331(a) 3
Section 1337, 28 U.S.C. §1337 3
Section 1361, 28 U.S.C. §1361 3
Section 1651, 28 U.S.C. §1651 3

Rules:

Federal Rules of Civil Procedure:
Rule 19 ..... 3, 14, 16

Federal Trade Commission Rules of Practice:
Section 3.22, 16 C.F.R. §3.22 4
Section 3.23, 16 C.F.R. §3.23 4

Supreme Court Rules:
Rule 19 15

Other Authorities:

L. Jaffe, Judicial Control of Administrative Action (1965) 12

IN THE

Supreme Court of the United States

October Term, 1972

Docket No. .....

THE COCA-COLA COMPANY, COCA-COLA BOTTLING CO. (Thomas), INC., COCA-COLA BOTTLING WORKS (Thomas), INC., COCA-COLA BOTTLING WORKS 3RD, INC., ELBERTON COCA-COLA BOTTLING COMPANY, RODDY MANUFACTURING COMPANY, WESTMINSTER COCA-COLA BOTTLING COMPANY, COCA-COLA BOTTLING COMPANY OF KEENE, INC., THE SCIOTO COCA-COLA BOTTLING COMPANY, and TEXAS COCA-COLA BOTTLING COMPANY,

Petitioners,

against

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Warren E. Burger, Chief Justice of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners herein,* named above, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, affirming dismissal of the complaint herein.

* Ann Arbor Coca-Cola Bottling Company, the only other party below, has been liquidated as a result of a corporate reorganization.

Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit dated February 15, 1973, has not yet been officially reported. It is unofficially reported at 1973 Trade Cases ¶74,360. The opinion of the District Court is reported officially at 342 F. Supp. 670 and is unofficially reported at 1972 Trade Cases ¶73,998. The opinions of both courts, as well as the opinions of the Federal Trade Commission and its Administrative Law Judge denying petitioners' motion to dismiss the Federal Trade Commission complaint for failure to join indispensable parties are reproduced in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on February 15, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented

The overriding issue presented by this petition is as follows:

When a District Court would not be required to prejudge facts within the special competence of an administrative agency, and there is no compelling governmental interest requiring the Court to abstain, does a District Court have jurisdiction to intervene to correct a threshhold and fundamental defect in an administrative agency proceeding?

Included within such broad issue, however, are a number of subsidiary issues including the following, not all of which were passed upon by the Court below because of its narrow opinion on jurisdiction:

1. Should indispensable parties to an adjudicative proceeding, the absence of whom would require that the final decision be set aside, be determined early in the course of that proceeding?

2. If so, is this principle applicable to adjudicative proceedings of administrative agencies when there is no governmental interest shown to be served by delaying such determination?

3. If an administrative agency, without adequate reason, refuses to join indispensable parties in such of its adjudicative proceedings may a District Court early in the course of that agency proceeding prevent the agency from continuing the proceeding until the agency has exercised its conceded power to add such indispensable parties?

4. When the FTC claims that several hundred contract bottlers of Coca-Cola will be bound by orders entered by the FTC against The Coca-Cola Company and the Thomas Companies, and further admits that substantial contract rights and property of such bottlers will be affected by such orders, and when the effect of any such orders would change an important provision of the bottler contracts with the result that such orders would subject Coca-Cola and the Thomas Companies to inconsistent decrees and the threat of multiple litigation involving such bottler contracts, are the bottlers indispensable parties to the proceeding?

Constitutional Provisions, Statutes and Rules Involved

Constitution of the United States, Amendment V, is set forth at page 47a of the Appendix.*

Judicial Code Sections 1331, 1337, 1361 and 1651, 28 U.S.C. §§1331, 1337, 1361 and 1651, are set forth at pp. 47a-48a of the Appendix.

Administrative Procedure Act, Sections 10(c) and 10(e), 5 U.S.C. §§704, 706, are set forth at pp. 48a-49a of the Appendix.

Federal Trade Commission Act, Section 5, 15 U.S.C. §45, is set forth at p. 49a of the Appendix.

Rule 19 of the Federal Rules of Civil Procedure is set forth at pp. 57a-58a of the Appendix.

* The suffix "a" hereinafter (*e.g.*, 1a) refers to page numbers within the appendices to this petition, *infra*.

Sections 3.22 and 3.23 of the Federal Trade Commission's Rules of Practice, 16 C.F.R. §§3.22 and 3.23 are set forth at pp. 58a-60a of the Appendix.

Statement of the Case

Introduction

In this petition "Coca-Cola" shall sometimes refer to The Coca-Cola Company or its predecessor in interest.

"Thomas Companies" shall refer to Coca-Cola Bottling Co. (Thomas), Inc., Coca-Cola Bottling Works (Thomas), Inc., and Coca-Cola Bottling Works 3rd, Inc., or their predecessors in interest.

"FTC" or "Commission" shall refer to the Federal Trade Commission.

"Docket 8855" shall refer to the adjudicative proceeding brought by the Commission against Coca-Cola and the Thomas Companies seeking to prevent observance of contractual provisions with their several hundred bottlers.

The Proceedings and Underlying Facts

Petitioners brought the present action in the District Court for the Northern District of Georgia to prevent the Federal Trade Commission from taking further action in an adjudicative proceeding instituted by it pending correction by the Commission of a threshold deficiency therein. The District Court denied petitioners' motion for a preliminary injunction and dismissed the complaint for asserted lack of jurisdiction. The Court of Appeals agreed that the District Court lacked jurisdiction because the doctrine of exhaustion of administrative remedies "means what it says." (4a).

The Coca-Cola Company is engaged primarily in the business of manufacturing syrups and concentrates used by contract bottlers in the preparation of soft drinks. These soft drinks are bottled and sold under Coca-Cola's trademarks, including the trademark Coca-Cola.

The soft drink identified by the trademark Coca-Cola was first formulated in 1886. This soft drink was originally marketed and sold in glasses at soda fountains. In 1899 the Thomas Companies entered into an agreement with Coca-Cola whereby they acquired the exclusive right to bottle Coca-Cola and sell it in bottles in most of the United States. Pursuant to this agreement, the Thomas Companies were obliged, among other things, to develop the territory for the sale of bottled Coca-Cola and to make the necessary investments in bottling plants and other capital and non-capital assets adequate to produce, advertise, market, sell and distribute bottled Coca-Cola throughout such territory.

Due to the enormous size of the territory and the immense investment necessary for its development, the Thomas Companies with the consent of The Coca-Cola Company in turn were permitted to authorize others to bottle and to sell bottled Coca-Cola in specified portions of the territory under similar contracts. Incident thereto but as an important provision thereof the several bottlers were granted exclusive rights in their territories. The result was the creation and the development of the business of bottling Coca-Cola trademarked products, which business has been conducted, in many cases by successive generations of the same family, until this day.

In 1920, a dispute arose between The Coca-Cola Company on the one hand, and the Thomas Companies and bottlers on the other hand. In the resulting lawsuits, the provisions of the then existing contracts were declared by the United States District Court for the District of Delaware to be important and interrelated provisions, providing, among other things, for the licensed use of Coca-Cola's trademarks within the territory, quality control and for the sale and use of syrup for the production of finished soft drinks. The Court specifically rejected the concept that the contracts were merely arrangements for the purchase and sale of bottlers syrup. 269 F. 796, 808. On the contrary, the Court found that pursuant to the contracts, property rights passed to the bottlers, *ibid.*, and that there was noth-

ing in the agreement that "may be said to be in unreasonable restraint of trade." *Id.* at 814.

The Delaware District Court declared that the contracts were perpetual in nature. Having so determined, the Court further declared that the bottlers and sub-bottlers had "an interest in the subject matter of the action." *Id.* at 815. The remaining bottlers were therefore permitted to intervene in the Delaware action.

In 1921, while the matter was pending on appeal, the parties entered into an agreement settling the case, which agreement the District Court then incorporated as the final decree in each case binding upon Coca-Cola, the Thomas Companies and the bottlers. The decree, which has never been vacated or modified, provides for exclusive territorial licenses.

Relying on the contract, the District Court decision and the decree, Coca-Cola bottlers over the years have built hundreds of bottling plants across the country to produce Coca-Cola trademarked products, and have made continuing investments in rolling stock, vending equipment, bottles, cases, merchandising equipment, etc., all of which have been estimated to amount to an investment of hundreds of millions of dollars. One result has been to build up consumer demand that has matured into a virtually inestimable good will. The rights of the parties under the contracts have long been considered important and valuable.

The territorial nature of the bottler contracts has been well known for years. Indeed, as recently as 1965 the FTC itself cited with approval the 1920 decision of the District Court for the proposition that ancillary restraints of trade are lawful. *Matter of Carvel,* Dkt. 8574 (July 19, 1965). Accordingly, bottlers have continued to purchase and pay for such property rights and to make further investments.

Nevertheless, on July 15, 1971, the Federal Trade Commission issued its complaint in Docket 8855 against Coca-Cola and the Thomas Companies, seeking to invalidate the territorial provisions in the contracts.

Coca-Cola and the Thomas Companies duly moved before the Administrative Law Judge (then Hearing Exam-

iner) to dismiss the complaint for failure to add the bottlers as indispensable parties. Seven of the more than seven hundred contract bottlers intervened and also moved to dismiss the complaint for failure to join as indispensable parties the contract bottlers.

The Administrative Law Judge denied the motion to dismiss the complaint although recognizing the indispensability of the bottlers as follows:

> "It is quite apparent that an ultimate decision by the Commission striking the exclusive territoral provisions from the various franchise contracts that the respondents [Coca-Cola and the Thomas Companies] have with their bottlers may very well directly affect substantial property rights these bottlers have acquired and own as a result of their franchise contracts. If a bottler were to lose its exclusive territory within which to sell the respondents' trademarked products, it would be without recourse to sue the respondents for damages or for injunctive relief requiring them to provide the protection against competition from other bottlers who may well invade its territory. To that extent, therefore, the bottlers may be considered indispensable." (43a-44a.)

Petitioners duly sought review by the Commission of the Administrative Law Judge's decision denying the motion. At this stage, Commission trial counsel conceded that since the issue of indispensable parties in this matter involves:

> "* * * substantial rights of both the public and the parties, and may materially effect [sic] the final decision in these matters, a determination of their correctness at this time, while the proceedings are now in the pre-hearing stages, will best serve the interests of justice."

Nevertheless, the Commission refused to dismiss the complaint or add the bottlers as parties to the proceeding in Docket 8855.

Neither the Administrative Law Judge nor the Commission ever showed that any governmental interest was served by not joining the bottlers. Indeed, in the courts below the Commission indicated that it would permit all bottlers to intervene if they so elected. Thus, trial with a large number of participants is admittedly manageable. Nor has the Commission ever shown that the bottlers could not be joined as parties. No one but the Commission can join the bottlers as parties to the administrative proceeding—petitioners have no power to add others.

Having thus exhausted all their administrative remedies petitioners immediately thereafter instituted this action, seeking a declaratory judgment that the contract bottlers are indispensable parties and further seeking an injunction to prevent the continuation of any further proceedings until such time as the contract bottlers are joined by the Commission as full parties to Docket 8855 and failing that, requiring that the Commission dismiss the complaint for nonjoinder.

While the proceedings were pending in the Court below, Commission counsel filed truly remarkable papers before the Administrative Law Judge in Docket 8855, which accentuate the need for relief from the courts. Specifically, the Commission staff announced a more specific form of relief they would seek: the FTC's so-called "Metro Area Bottler Handicap." Under this "Bottler Handicap" Coca-Cola bottlers in the 200 largest Standard Metropolitan Statistical Areas (SMSA) would be prohibited from competing in the exclusive territories of bottlers outside such Metro areas, but bottlers outside the 200 areas would be able to ship into them and compete with existing bottlers there. Bottlers outside the 200 areas are to be allowed to ship to each other's territories and possibly thereby to destroy each other. Exclusive territories were to be preserved in some places for ten years—but in other places not at all.

These relief provisions were proffered by Commission counsel in recognition that many bottlers would be forced out of business by a successful FTC proceeding. But the

substance of it was that bottlers are to be treated differently, that obligations are to be imposed on some bottlers which will not be imposed on others—all without any of the bottlers being parties to the proceedings. And the Comission was trying to wash its hands of any problems or differences that might arise, leaving resolution of the inevitable conflict to the bottlers, The Coca-Cola Company and the Thomas Companies.

The decree of the United States District Court for the District of Delaware entered in 1921 has never been modified, vacated or rescinded and is still outstanding. In the event the Commission enters a final order, Coca-Cola and the Thomas Companies will then be subject to two existing conflicting decrees—that of the District Court and that of the Commission. No amount of speculation or interpretation can change this incontrovertible fact.

Moreover, unless the bottlers are made parties to and are bound by any adverse Commission decision they would be free to initiate litigation either against petitioners or against other bottlers under their contracts or pursuant to the judgment of the District Court. Regardless of the outcome of any such proceedings petitioners and the public would be subjected to multiple litigation.

If the order proposed by the FTC becomes effective, bottlers could be forced either to go out of business or to sell their assets and equipment to another bottler. The record herein shows that in such a sale, they would expect to realize very little on their investments in plant and equipment because such a sale would be the equivalent of a liquidation of a business. (R. 355).*

The ability or willingness of Coca-Cola bottlers to make further investment in development of their territories, while the value of their existing investment thus remains under a cloud, is being impaired. The good will and business of Coca-Cola products, and the marketing of Coca-Cola products through the bottler contracts, built up so

* References preceded by "R." (*e.g.*, R. 1) are to the bound Appendix in the Court below.

laboriously over 70 years, would be further and unnecessarily impaired by the conduct of the Commission, with consequent injury not only to the bottlers but also to Coca-Cola and the Thomas Companies.

The Commission can add the bottlers as parties in Docket 8855. No adequate reason has ever been given why the Commission refuses to do so.

Without even getting into such questions, and without discussion of indispensable parties, the courts below ruled that the District Court did not have jurisdiction and dismissed the complaint.

Reasons for Allowance of the Writ

I

The Court below adopted an inflexible test of the District Court jurisdiction in conflict with applicable decisions of this Court.

The Court below adopted a thoroughly rigid approach: The doctrine of exhaustion of administrative remedies "means what it says" (4a). Ignoring cases which came to directly contrary conclusions about the FTC—such as *Elmo Division of Drive-X Co.* v. *Dixon,* 348 F.2d 342 (D.C. Cir. 1965); *Sterling Drug, Inc.* v. *FTC,* 450 F.2d 698, 710-711 (D.C. Cir. 1971); *Jewel Companies, Inc.* v. *FTC,* 432 F.2d 1155, 1159-1160 (7th Cir. 1970)—the Court concluded that the Federal Trade Commission Act contemplates judicial review only of an order to cease and desist and such review is to be only by the Court of Appeals (4a). The Court below concluded that if plaintiffs eventually prevail on review of the final order and it is necessary to begin anew "it will not be the first time events have taken that course," and that plaintiffs must wait until then with "fortitude and patience" (8a).

The several decisions of this Court in recent years, which went to great length to provide guidance for the

lower courts on this precise doctrine were not even cited in the opinion below, *e.g.*, *McKart* v. *United States*, 395 U.S. 185 (1969); *McGee* v. *United States*, 402 U.S. 479 (1971); *Parisi* v. *Davidson*, 405 U.S. 34 (1972).

The opinion below is in direct conflict with such applicable decisions of the Court. Thus, this Court has ruled:

> "After *McKart* the task for the courts, in deciding the applicability of the exhaustion doctrine to the circumstances of a particular case, is to ask 'whether allowing all similarly situated registrants to by-pass [the administrative agency in question] would seriously impair the [agency's] ability to perform its functions' " *McGee, supra*, 402 U.S. at 484

The Court in *McGee* expressly noted the possible "harsh impact" of the exhaustion doctrine and declared that the doctrine does not "shield an invalid order from judicial correction, simply because the interest in time-saving self-correction by the agency is involved." Instead of applying the exhaustion doctrine "blindly in every case," this Court taught:

> "• • • the contention that the rigors of the exhaustion doctrine should be relaxed is not to be met by mechanical recitation of the broad interests usually served by the doctrine, but rather should be assessed in light of *discrete analysis* of the particular default in question, *to see whether there is 'a governmental interest compelling enough' to justify the forfeiting of judicial review.*" *Id.* at 485 (Emphasis added)

In short, where a wrong has been committed by an administrative agency, a person is entitled to relief from the courts in the absence of compelling justification to the contrary. A court must first determine on a practical basis whether judicial intervention before exhaustion of all administrative proceedings would seriously impair the agency's ability to perform its functions. *McKart* v. *United States*, 395 U.S. at 197. "The basic purpose of the ex-

haustion doctrine is to allow an administrative agency to perform functions within its special competence * * * Id. at 194-195", *Parisi* v. *Davidson*, 405 U.S. 34, 37 (1972).

The Court below in this case did not follow the standards established by this Court. On the contrary, the Court below invoked a strictly "mechanical recitation" of prior decisions without any indication of the practicalities of the situation or of the harsh impact thereof or of whether the exhaustion doctrine was being used to fulfill its purposes.

In the instant case, judicial intervention at the present time will not seriously impair the agency's ability to perform its functions. There are no further facts to be decided with respect to this issue, nor is there any administrative expertise to be exercised. The full Commission has already ruled on this issue and its decision will undoubtedly be binding within the Commission as this case proceeds. Thus, it is clear that "judicial review would not be significantly aided by an additional administrative decision" *McKart* v. *United States, supra,* at 199. See also Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 427 (1965).

A factor which this Court weighed in *McGee* to determine whether the exhaustion doctrine is properly applied at any given stage was whether an additional opportunity should be provided for the administrative agency to discover and correct its own error, thereby eliminating the need for judicial review altogether. Here, of course, the error has not only been discovered; the Commission has expressly refused to join the bottlers as parties. Accordingly, "The procedures and corrective opportunity of the [Commission's] administrative apparatus ha[ve] thus been wholly utilized * * *". *Parisi, supra,* at 38, 39. Effective application of the exhaustion doctrine presupposes the potential for an effective relief. Where, as here, the issue has already been passed upon by the Commission, it is ripe for judicial review.

Nor will judicial intervention now induce frequent or deliberate flouting of the administrative process. This

Court in *McGee* expressly recognized that "the fear of 'frequent and deliberate flouting' can easily be overblown". 402 U.S. at 485. But more importantly, petitioners have not attempted to flout or by-pass the Commission's proceedings. They followed the Commission's rules of procedure and applied first to the Administrative Law Judge; they then duly appealed to the Commission. They sought relief from the Court only when it became clear that there was nothing either to be determined by administrative expertise or by further administrative proceedings.

Indeed, if judicial intervention is permitted now, and the effect hereafter should be to require the Commission to join as parties in its proceedings all those persons whose rights it seeks to take away, then petitioners respectfully submit such decision would have a most salutary constitutional effect.

In lieu of applying the standards set forth by this Court in *McKart* and *McGee*, the Court below referred to certain exceptions to the exhaustion doctrine found in particular prior cases. These cases are in fact illustrative applications of the standards in particular situations, rather than limitations upon the jurisdiction of the District Court. Nevertheless, the decision of the Court below is in conflict with the applicable decisions of this Court even under such prior cases.

Thus, under the prior cases one of the "exceptions" to the exhaustion doctrine exists where there are claims of constitutional violations by administrative agencies. *E.g., Wolf Corporation* v. *SEC*, 317 F.2d 139 (D.C. Cir. 1963). Failure to join all persons materially interested legally or beneficially in the subject matter of a proceeding so that there may be an equitable and complete decree constitutes a denial of due process. *E.g., New Orleans Water Works Co.* v. *New Orleans*, 164 U.S. 471, 480 (1896) (When ordinances which granted exclusive licenses were challenged, and none of the licensees were before the Court, a decree "on its face would not be due process"). *Western Union Company* v. *Pennsylvania*, 368 U.S. 71, 75 (1961) (There can be "no doubt that the defendant has been denied due proc-

ess" by a judgment unless the courts had power to protect it from other claims by adding the parties making such claims.) However, the Court below found that Coca-Cola's and the Thomas Companies' "right" to be free from the prospect of conflicting claims of the absent bottler-licensees is not a constitutional right (7a). Thus, the decision is in further conflict with applicable decisions of this Court.

Moreover, the Circuit Court relied on a bare reading of 15 U.S.C. §45(c), the statutory section which provides for review of a final cease and desist order of the Commission by the Circuit Courts of Appeal, and on its reading of the Administrative Procedure Act, 5 U.S.C. §551 *et seq.*, arrived at the conclusion that judicial review was improper at this stage. In *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967) this Court ruled, however, that such conclusions should not be so drawn, stating:

> "The mere fact that some [agency] acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent."

In short, even under the line of cases antedating this Court's recent analyses in *McKart, McGee* and *Parisi*, judicial intervention by a District Court would be proper when the contemplated proceeding, if consummated, would be set aside on review on procedural grounds. *E.g., Wolf Corp.* v. *SEC*, 317 F.2d 139, 142-43 (D.C. Cir. 1963); *Elmo Division of Drive-X Co.* v. *Dixon*, 348 F.2d 342, 344 (D.C. Cir. 1965).

If it is ultimately decided that the bottlers are indispensable parties, the whole proceeding will have been wasted and will have to be done over. *Cf.* Rule 19, Fed. R. Civ. P. While the Court below noted it will not be the first time events will have taken that course (8a), this is hardly reason to condone the practice where it can reasonably be avoided without interference with either the administrative process or any other compelling governmental interest.

If public confidence in the courts is to be maintained, this Court cannot allow to stand decisions of the lower courts that are without any justification and are in conflict with the prior teachings of this Court, and that are rendered under a mistaken notion that such courts do not have any other power. It is undoubtedly for reasons such as this that this Court's own Rule 19 provides that one of the considerations for issuance of the writ of certiorari may be where the decision of the court below is in conflict with applicable decisions of this Court. Such is the case here and the writ should be allowed.

II

This case raises important questions of Federal law, concerning the proper roles of the Commission and the Federal courts in assuring the lawfulness and effectiveness of Commission adjudicative proceedings at a meaningful stage, that should be settled by this Court.

For purposes of ruling on the question of District Court jurisdiction, the courts below did not rule on the issue of whether the bottlers are indispensable parties. For purposes of such jurisdictional decisions it may therefore be assumed (as petitioners believe is self-evident) that the bottlers are indispensable parties.

The result of the decision below, however, is that the "public stake" in the doctrine of indispensable parties, *Provident Bank & Trust Co.* v. *Patterson,* 390 U.S. 102, 111 (1968), is not being given effect at this time.

This doctrine of indispensable parties is a long-standing one, *Shields* v. *Barrow,* 58 U.S. (17 How) 130 (1854), whose principles, this Court has recently stated, "are still valid today" *Provident Bank & Trust Co., supra,* at 124. The doctrine serves a public purpose in the protection of the interests of the parties, the absent persons, the courts and the public. *Ibid.*

The doctrine of indispensable parties is consistent with the Commission's obligations to enforce the antitrust laws.

The doctrine does not seek an exemption from such laws. It may be applied simultaneously with the enforcement of the antitrust laws or the Federal Trade Commission Act. The Commission can add the bottlers as parties and there has not even been an attempt by the Commission to show that they can not be added. Indeed, since application of the doctrine would insure that all parties that might have an interest would be bound by any decree entered, it would tend to make enforcement that much more meaningful.

When, as here, there is no compelling interest to the contrary, the indispensable party doctrine and enforcement of the antitrust laws should both be sought to be applied in the most meaningful manner possible, at the most meaningful time.

The most meaningful time for a determination of indispensable parties scarcely requires argument. Such parties should be determined early in the proceeding. By their very nature, if parties are in fact indispensable and are not joined as parties, then any decree entered would have to be set aside. *Provident Bank & Trust Co.* v. *Patterson,* 390 U.S. 102 (1968); Rule 19, Fed. R. Civ. P. Indeed, this Court indicated in *Provident* that one of the factors to be considered in determining whether parties are indispensable is whether or not the issue is raised early in the proceedings. 390 U.S. at p. 110. The reason is apparent on analysis—one of the purposes of the rule is to avoid multiple litigation. If one litigation has already been completed, then one of the purposes and benefits of the doctrine is defeated by waiting until after the trial is completed before the determination is made. Indeed, to the extent that the courts may bend over to uphold a completed proceeding, the very standards applied may be different on appeal.

Moreover, as this Court recently stated in *Fuentes* v. *Shevin,* 407 U.S. 67, 81 (1972):

> "If the right to notice and a hearing is to serve its full purpose, then it is clear that it must be granted at a time when the deprivation can still be prevented."

Thus, the appropriate time for judicial intervention on the issue of indispensable parties is at the beginning of the proceeding. The decision below effectively tends to emasculate the doctrine of indispensable parties in agency proceedings under the guise of a ruling on jurisdiction, without any showing that it in any way serves a public purpose or fosters the statutory scheme.

The Commission has argued that the doctrine of indispensable parties does not apply to its proceedings. It has argued that the Government's purpose and object in bringing the proceeding is sufficient to negate the indispensable party doctrine. Under this approach, the doctrine would almost never be applicable in any case brought by the Government, or any private action under a Federal statute. Yet this is clearly not the law. As this Court said when the Government previously sought to deny the doctrine of indispensable parties in an antitrust case on similar grounds:

> "* * * the Government goes further and asserts that its purpose and object justify the absence of the lessees from the case. Indeed, the Government takes merit to itself in relieving them of a thraldom * * * But a lessee may like his situation, may have deliberately chosen it, and may not care for any interposition, benevolent or otherwise." *United States* v. *United Shoe Machinery,* 247 U.S. 32 at 60 (1918).

Under the Commission's reasoning (39a) if a person has a legally protected interest in a contract he must be joined as a party; whether a person has a legally protected interest in a contract is determined at the beginning of a suit by the nature of the charges; all FTC suits charge that the acts or practices in question are illegal; therefore, no person has a legally protected interest in any matter challenged by the FTC and need never be joined as a party if the Commission does not elect to do so.

Such topsy-turvy reasoning is unbecoming any agency of the Federal Government.

The Commission's argument gains no support from decisions such as *Nat. Licorice* v. *Labor Board,* 309 U.S. 350 (1940), which have also been cited by the Commission. In that case an employer had coerced its employees to refrain from becoming members of the union and to sign purportedly individual contracts of employment in violation of the Act. In point of fact the so-called individual contracts of employment were negotiated by a committee that had been selected by the employer and thereafter retained only a very limited function. The argument was made that in the absence of the employees the Board was powerless to declare the contracts void. The Supreme Court rejected this interpretation. As the Court later explained, the purpose of the Act was to free the employees from prohibited pressures so as to enable them to be able to bargain freely, yet the contracts there were executed under such unlawful pressures. *Carpenters' Union* v. *Labor Board,* 357 U.S. 93, 105 (1958). No such situation exists in the instant case.

Moreover, in *National Licorice,* the Court expressly pointed out that the employees were not foreclosed from taking any action to secure an adjudication upon the contracts, and that the Court did not prejudge their rights in the event of such adjudication, 309 U.S. at 363. The situation in the present case is exactly the opposite for the Commission expressly purports to rule on bottler rights and to abrogate them.

Additionally, the Court in *National Licorice* clearly indicated that the scope of the Board's order could only be directed to those who had been joined as parties, 309 U.S. at 366. However, here a Commission's "Bottler Handicap" order, if entered, will be directed at bottlers who are not joined. This is a far cry from the principles of *National Licorice* where the order affected only those who were parties, and relieved the other parties to the contract from the employer's coercion.

Accordingly, the rule of *Shields* has been regularly honored in antitrust cases. *E.g., United Shoe Machinery* case, 222 F. 349 (D. Mass. 1915), *aff'd* 247 U.S. 32 (1918); *Fruit Growers' Express Inc.* v. *FTC,* 274 F. 205 (7th Cir. 1921),

cert. granted, 257 U.S. 627 (1921), *cert. dismissed*, 261 U.S. 629 (1923); *Sinclair Refining Co.* v. *FTC*, 276 F. 686 (7th Cir. 1921), *aff'd* 261 U.S. 463 (1923); *United States* v. *Northern Pacific Railroad Co.*, 134 F. 715 (8th Cir. 1905); *United States* v. *Hearst Corporation*, —— F. Supp. ——, 1972 Trade Cases ¶ 74,161 (S.D.N.Y. 1972), and should continue to be so honored.

In short, when an administrative agency without adequate reason refuses to join indispensable parties in one of its adjudicative proceedings, and there is no governmental interest shown to be served by delaying a determination on its refusal to add such parties, then in order to satisfy the public interest in the objectives of the antitrust laws and in the doctrine of the indispensable parties, both objectives should be simultaneously honored and observed at the most meaningful time, namely at the beginning of the suit. This can only be achieved herein by the present intervention of the courts.

The decision below poses a question of Federal law concerning the proper roles of the Commission and the Federal courts which should be settled by this Court.

III

The Commission proceedings, designed to alter the time-honored structure of an industry after years of judicial approval, threatens serious disruption to that industry and many of its members. This Court should exercise its power of supervision to help minimize the consequences which may flow from improper procedure in that proceeding.

We shall put aside the question of whether the Commission's action in trying to bind absent persons is not really legislation, beyond the agency's powers, rather than adjudication.

The territorial provisions of the bottler contracts have been in effect for over 70 years. They were approved by the District Court for the District of Delaware in a decree

that has never been vacated or rescinded. The FTC approved the applicable legal principle of that case in 1965 (*supra*, p. 6). The parties to the bottler contracts have relied on those provisions and on the decree and have invested hundreds of millions of dollars as a result. The Commission is now attempting to re-structure that substantial industry.*

It is generally accepted that for any such Commission relief to be effective the bottlers must be bound. The Commission proceeding now seeks to impose certain obligations on some of the bottlers but not upon others, and to eliminate territorial rights as to some of them now but in ten years as to others, under the Commission's so-called "Metro Bottler Handicap". The Commission claims that the bottlers will be bound by any such order entered in the proceeding, whether or not they are parties.

If the Commission prevails on this novel approach to industry re-structuring, it could scarcely be denied that further litigation will take place. At the very least, for any particular bottler to be placed under an affirmative handicap vis-a-vis other bottlers, as a result of an administrative proceeding to which he was not a party, without judicially testing the validity of such handicap, would constitute the height of accommodation to administrative weal. The bottlers' interest is too substantial to permit them to engage in such complacent accommodation. They not only may sue—they would have little to lose by suing regardless of the outcome.

In *PepsiCo, Inc.* v. *FTC*, 472 F.2d 179 (2d Cir. 1972), *pet.* for *cert.* filed April 19, 1973, two members of the Court of Appeals for the Second Circuit expressed the belief that bottlers could be bound even though not parties. But Judge Medina vigorously dissented in a scathing but scholarly opinion.

---

* The Commission has issued similar administrative complaints against seven other soft drink syrup companies without naming the bottlers in those proceedings either.

Whatever the ultimate outcome it is fairly clear that an issue exists as to the binding nature of any Commission proceeding on bottlers. See the constitutional arguments in *Western Union Telegraph Co.* v. *Pennsylvania*, and *New Orleans Waterworks Co.* v. *New Orleans, supra*, at 480. See also *United States* v. *Glaxo*, —— U.S. ——, ——, 41 U.S.L.W. 4195, 4198 (Jan. 22, 1973).

The Court below questioned the ability of petitioners to assert the violation of the rights of bottlers because of their nonjoinder (7a). This is a misconstruction of the doctrine of indispensable parties. It is virtually axiomatic that it must be the parties who are already before the court who raise the issue, if the issue is to be raised at all. *Provident Bank, supra*, at p. 110. This is basically because the doctrine of indispensable parties seeks to protect the rights of not only the absent persons, but also of the parties, the courts and the public. The courts may raise the issue *sua sponte*. *Minnesota* v. *Northern Securities Co.*, 184 U.S. 199 (1902); *Continental Insurance Co. of New York* v. *Cotten*, 427 F.2d 48, 51 (9th Cir. 1970). So, too, may the parties. If this were not so, the issue could not be raised even after completion of the administrative hearing.

The fact remains, however, that the Commission proceeding is thoroughly disruptive of the industry, including petitioners. The longer the uncertainty continues the longer the disruption will continue. As long as the question of whether the bottlers will be bound is open to any question at all that disruption will continue. The issue is too important to too many people to be allowed to drag on.

This Court should exercise its supervisory authority at this time to help minimize the consequences which may flow from improper procedure in that proceeding.

Conclusion

The petition should be granted.

Respectfully submitted,

THOMAS KIERNAN
Attorney for Petitioner
The Coca-Cola Company
14 Wall Street
New York, New York 10005

Of Counsel:
CHARLES L. GOWEN
EDWARD WOLFE
WILLIAM A. CLINEBURG, JR.
MARIO DIAZ-CRUZ III
KING & SPALDING, Esqs.
WHITE & CASE, Esqs.

GORDON B. SPIVACK
Attorney for Petitioners Coca-Cola Bottling Co. (Thomas), Inc., Coca-Cola Bottling Works (Thomas), Inc., Coca-Cola Bottling Works 3rd, Inc.
25 Broadway
New York, New York 10004

Of Counsel:
J. GUY BEATTY, JR.
LORD, DAY & LORD, Esqs.
MILLER, MARTIN, HITCHING, TIPTON, LENIHAN & WATERHOUSE, Esqs.

RANDOLPH W. THROWER
Attorney for Petitioners Elberton Coca-Cola Bottling Company, Roddy Manufacturing Company, Westminster Coca-Cola Bottling Company, Coca-Cola Bottling Company of Keene, Inc., The Scioto Coca-Cola Bottling Company, and Texas Coca-Cola Bottling Company
3100 First National Bank Tower
Atlanta, Georgia 30303

Of Counsel:
WILLIAM M. HAMES
SUTHERLAND, ASBILL & BRENNAN, Esqs.

INDEX TO APPENDICES

PAGE

Appendix A—Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit 1a

Appendix B—Opinion and Judgment of the United States District Court for the Northern District of Georgia 11a

Appendix C—Order of the Federal Trade Commission Denying Motion to Dismiss 29a

Appendix D—Order of the Federal Trade Commission Administrative Law Judge Denying Motion to Dismiss 41a

Appendix E—Constitutional Provisions, Statutes and Rules Involved 47a

APPENDIX A

Opinion of the Court of Appeals (Decided February 15, 1973)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72-2270

THE COCA-COLA COMPANY, *et al*,
Plaintiffs-Appellants,

vs.

FEDERAL TRADE COMMISSION,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

(February 15, 1973)

Before BROWN, Chief Judge, INGRAHAM, Circuit Judge, and McRAE, District Judge.

McRAE, District Judge: The litigation from which this appeal arises is peripheral to proceedings that the Federal Trade Commission, defendant-appellee, (FTC) initiated on July 15, 1971, against The Coca-Cola Company, Coca-Cola Bottling Co., Inc., Coca-Cola-Bottling Works, Inc., and Coca-Cola Bottling Works 3rd, Inc., plaintiffs-appellants (The Companies). The FTC brought these administrative proceedings (Docket No. 8855) pursuant to its authority and responsibility "to prevent * * * corporations * * *

from using unfair methods of competition in commerce * * *." 15 U.S.C. §45(a)(6). The FTC has alleged principally that territorial restraints incident to sales and trademark licensing by The Companies constitute an antitrust violation. The merits of this contention, which the FTC has made the basis of complaints against seven similar enterprises,[1] are not at issue here.

In Docket No. 8855, The Companies set up as an affirmative defense the failure to join as indispensable parties each of the seven hundred ninety-two individual bottling companies with whom The Companies have contractual relationships or, alternatively, the failure to join representative bottling companies sufficient to protect mutually antagonistic interests of relevant subclasses of bottling companies.[2] Thereafter, the FTC permitted seven bottling companies[3] in their individual capacities to intervene in Docket No. 8855, and these Bottlers-Intervenors adopted the position of The Companies on the indispensable party issue.

On January 7, 1972, the hearing examiner denied the motions to dismiss. Seeking intra-agency reconsideration of the hearing examiner's adverse decision on the indispensable parties question, The Companies and the Bottlers-

1. The six other manufacturers of soft drink syrups are Dr. Pepper, Cott, Crush, Royal Crown Cola, Pepsi Cola and The Seven-Up Company. The same contentions plaintiffs make here were unsuccessfully pressed by The Seven-Up Company in *The Seven-Up Company* v. *Goodhope et al.*, No. 72 C 285(2) (E.D. Mo., Sept. 12, 1972) and by Pepsi Co., Inc., in *Pepsi Co., Inc.* v. *Federal Trade Commission et al.*, 343 F.Supp. 396 (S.D. N.Y. 1972), *aff'd* Nos. 72-1911, 72-1912 (2nd Cir., Nov. 20, 1972) (Medina J., dissenting).

2. At oral argument, counsel for appellants suggested that at least three classes of bottlers should be represented: "true metropolitan," "quasi-metropolitan" and "non-metropolitan."

3. Appellants Elberton Coca-Cola Bottling Co., Roddy Manufacturing Company, Westminster Coca-Cola Bottling Company, Inc., Coca-Cola Bottling Company of Keene, Inc., Ann Arbor Coca-Cola Bottling Company, The Scioto Coca-Cola Bottling Company, and Texas Coca-Cola Bottling Company (hereinafter Bottlers-Intervenors).

Intervenors asked for and obtained *de novo* review by the Commission. After a hearing, the Commission, also, denied the motions to dismiss in Docket No. 8855 on March 23, 1972.

On April 18, 1972, The Companies and the Bottlers-Intervenors filed their complaint in the Northern District of Georgia seeking a declaratory judgment on the indispensable parties question and asking that the FTC be enjoined from proceeding further unless there was joinder of the parties adjudged indispensable. The District Court granted FTC's motion to dismiss and denied relief. We affirm that disposition of the case. The Court below did not reach the merits of the controversy about the indispensability of the contract bottlers or appropriate class representatives, nor do we. We agree that judicial resolution of that question at this juncture would be premature.

In *Frito-Lay, Inc.* v. *Federal Trade Commission,* 380 F.2d 8 (5th Cir. 1967), this Court declined to disturb the decision of the District Court not to interfere in ongoing Commission proceeding even though the plaintiff there alleged that "the administrative proceeding was outside the jurisdiction of the Commission." *Id.* at 9. Plaintiffs in the present case allege nothing that comes so close as the allegations in *Frito-Lay, Inc.,* to fitting within the tightly circumscribed exceptions to "the long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened inquiry until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 50-51 (1938).

The Federal Trade Commission Act, 15 U.S.C. §§41 *et seq.,* contemplates judicial review only of "an order of the Commission to cease and desist," 15 U.S.C. §45(c), and then only "in the court of appeals of the United States." *Id.* This scheme is fully consonant with the Administrative Procedure Act, 5 U.S.C. §551 *et seq.*[4] The Supreme

4. Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate

(footnote continued on next page)

Court has said, moreover, that where Congress "has enacted a specific statutory scheme for obtaining review, * * * the doctrine of exhaustion of administrative remedies * * * requires that the statutory mode of review be adhered to notwithstanding the absence of an express statutory command of exclusiveness." *Whitney Nat'l Bank* v. *Bank of New Orleans,* 379 U.S. 411, 422 (1965). If a procedure for review prescribed by statute ought to be deemed exclusive absent an explicit requirement, there can be little doubt in the present case that the mandatory provision of the Federal Trade Commission Act that "the jurisdiction of the court of appeals * * * shall be exclusive," 15 U.S.C. §45(d) means what it says. This is not to suggest, however, that a different disposition of this case would have been warranted if the plaintiffs had come directly to this Court. *Texaco, Inc.* v. *Federal Trade Commission,* 301 F.2d 662 (1962).

The present case is not one raising "questions particularly high in the scale of our national interest because of their international complexion," *McCulloch* v. *Marineros de Honduras,* 372 U.S. 10, 17 (1963) and, therefore, affording "a uniquely compelling justification for prompt judicial resolution," *id.,* of a controversy normally left to an agency for initial disposition. Nor is the present case one in which the imposition of criminal sanctions turns on the procedural niceties of administrative law. *See, e.g., Gutknecht* v. *United States,* 396 U.S. 295 (1969); *United States* v. *Davila,* 429 F.2d 481 (5th Cir. 1970).

The most widely recognized exception to the general rule against judicial consideration of interlocutory agency rulings is the class of cases where an agency has exercised

---

agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

authority in excess of its jurisdiction or otherwise acted in a manner that is clearly at odds with the specific language of a statute. The leading case of this kind is *Leedom* v. *Kyne*, 358 U.S. 184 (1958). In *Kyne*, the National Labor Relations Board had grouped professionals with non-professionals in the same bargaining unit without a vote of the professionals, in defiance of an express statutory prohibition. Since this "was an attempted exercise of power that had been specifically withheld," at 189, it was properly enjoined by the District Court. The rule that only "a plain contravention of a statutory mandate" justifies district court intervention before termination of election procedures in labor cases has been followed in this Circuit, *Boire* v. *Miami Herald Publishing Co.*, 343 F.2d 17, 24 (1965), and an analogous rule has been applied to Federal Trade Commission proceedings. *Federal Trade Commission* v. *J. Weingarten, Inc.*, 336 F.2d 687 (5th Cir. 1964).[5] The rule that agency action "contrary to a specific mandate of * * * [an] Act [of Congress]" *Templeton, supra* at 1069, is remediable judicially before administrative proceedings are at an end has been applied in the context of other agencies, notably in selective service cases, see, e.g., *Oestereich* v. *Selective Service Board*, 393 U.S. 233 (1968); *Breen* v. *Selective Service Board*, 396 U.S. 460 (1970). What is as clear as this exception to the general requirement of exhaustion of administrative remedies, however, is that plaintiffs in the present case do not fit within it.

The remaining "exception" to the requirement that courts await final agency action before reviewing disputes engendered by the conduct of administrative proceedings "has," as the learned trial judge observed, "only limited application in the Fifth Circuit," citing *Boire* v. *Miami Herald Publishing Co.*, 343 F.2d 17, 21 n.7 (5th Cir. 1965). Although by now it is probably a correct statement of the law even in our own circuit that an "assertion of constitu-

5. The decision in *Templeton* v. *Dixie Color Printing Co.*, 444 F. 2d 1064 (5th Cir. 1971) stands for the proposition that the question of the propriety of district court action does not turn on whether clear statutory language requires action to be taken or to be forborne.

tional right * * * not transparently frivolous * * * [gives] the District Court jurisdiction" to hear an attack on an interlocutory agency order, *Fay* v. *Douds,* 172 F.2d 720 (2nd Cir. 1949) (L. Hand); *Contra, Volney Felt Mills, Inc.* v. *Le Bus,* 196 F.2d 497 (5th Cir. 1952), the "fact that the attack is voiced in conclusory language of a denial of due process and like constitutional rights does not warrant stopping * * * [an administrative agency] in its tracks." *Bokat* v. *Tidewater Equipment Co.,* 363 F.2d 667, 672 (5th Cir. 1966). When, as in the present case, parties bring suit in District Court alleging the deprivation of specific constitutional rights or, indeed, specific statutory rights, *Leedom* v. *Kyne, supra,* the District Court has jurisdiction to inquire into the preliminary question of whether judicial vindication of the alleged rights is appropriate in a given procedural setting, and, if so, whether such rights have been infringed and how they ought to be redressed.

In the present case, the plaintiffs specifically complain that, if the proceedings before the Commission continue and FTC prevails, The Companies will be subject to two inconsistent decrees, *viz.,* the apprehended Commission order and a consent decree entered by a District Court in *The Coca-Cola Bottling Co.* v. *The Coca-Cola Co.,* 269 F. 796 (D. Del. 1920). A contention of *res judicata* is not cognizable by courts until administrative proceedings are at an end, *SEC* v. *Otis & Co.,* 338 U.S. 843 (1949), and we intimate no view as to the merits of this contention. The plaintiffs go further, projecting the outline of disarray and disaster sketched by the technical res judicata argument by conjuring up the vision of The Companies defending some 800 lawsuits simultaneously. This formidable problem, plaintiffs argue, might be avoided by the expedient of making all potential litigants parties to the Commission proceeding.[6]

6. Like the majority in *Pepsi Co. Inc.* v. *Federal Trade Commission et al.,* Nos. 72-1911, 72-1912 (2nd Cir. Nov. 20, 1972), we are "astonished" at the "proposition that a court would hold one person liable to another for doing something within the United States which a federal administrative agency, acting within its jurisdiction, has found to be necessary for the enforcement of a federal regulatory statute.

The "right" to be free from defending a multiplicity of lawsuits is not a statutory right, not a constitutional right and, in the context of the present case, not a right at all but an equitable principle properly looked to by an equity court only after it has satisfied itself that it has the power and responsibility to do equity. The extraordinary remedy of judicial intervention in agency proceedings still in progress is unavailable unless necessary to vindicate an unambiguous statutory or constitutional right, and only when this condition is satisfied will a court look to the general body of equitable jurisprudence and other appropriate sources for the purpose of fashioning relief. To adopt the plaintiffs' position, on the other hand, would be to make the rule that judicial intervention to "correct" an interlocutory agency ruling is available wherever an agency ruling differed from some equitable maxim.

In part, plaintiffs' argument is grounded not on a right unequivocally vested in them by statute but on asserted constitutional rights of third parties, namely the non-joined bottlers' respective rights to due process. It is always refreshing when giant corporations evince solicitous regard for others' rights—and we have learned to expect refreshment from The Coca-Cola Company—but it is no occasion for judicial review of interlocutory agency decisions. As to the plaintiffs' own right in this regard, we have little to add to Judge Friendly's scholarly discussion in *Pepsi Co., Inc.* v. *Federal Trade Commission et al.*, Nos. 72-1911, 72-1912 (2nd Cir., Nov. 20, 1972) at 577-78. See, e.g. *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

The plaintiffs are asking that a procedural, "case-handling" decision be overturned *in media res* to require joinder "with the concomitant complication and clutter of the hearing." L. Jaffe, Judicial Control of Administrative Action 444 (1965). If trial courts are insulated from this kind of interference, see 28 U.S.C. §1292(a), certainly administrative tribunals ought to be and, indeed, they generally have been immune from interlocutory review of pro-

cedural rulings. E.g., *Texaco, Inc.* v. *Federal Power Commission*, 329 F.2d 223 (C.A.D.C. 1963), *cert. denied*, 375 U.S. 941 (1964); *Chicago Automobile Trade Association* v. *Madden*, 328 F.2d 766, 769 (7th Cir.), *cert. denied*, 377 U.S. 979 (1964). If plaintiffs eventually prevail on review of the final order and it is necessary to begin anew with Commission proceedings, it will not be the first time events name [sic] taken that course. See *Riss & Co.* v. *United States*, 341 U.S. 907 (1951). For the time being, plaintiffs "must, as all others similarly situated must, wait with such fortitude and patience as * * * [they] can muster." *Volney Felt Mills, Inc.* v. *Le Bus*, 196 F.2d 497, 498 (5th Cir. 1952).

AFFIRMED.

Appendix A—Judgment

Judgment of the Court of Appeals
(Entered February 15, 1973

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1972

No. 72-2270

D. C. Docket No. CA 16484

THE COCA-COLA COMPANY, *et al.*,
Plaintiffs-Appellants,

versus

FEDERAL TRADE COMMISSION,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

Before:

BROWN, Chief Judge, INGRAHAM, Circuit Judge, and McRAE, District Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said

District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiffs-appellants pay to defendant-appellee the cost on appeal to be taxed by the Clerk of this Court.

February 15, 1973

Issued as Mandate: Mar 9 1973

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U.S. Court of Appeals, Fifth Circuit

/s/ By Maryette K. Farley
Deputy
New Orleans, Louisiana Mar 9 1973

APPENDIX B

Opinion of the District Court (Decided May 16, 1972)

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA
(ATLANTA DIVISION)

Civil Action No. 16484

THE COCA-COLA COMPANY, a corporation;
COCA-COLA BOTTLING CO. (THOMAS), INC., a corporation;
COCA-COLA BOTTLING WORKS (THOMAS), INC.,
a corporation;
COCA-COLA BOTTLING WORKS 3RD, INC., a corporation;
ELBERTON COCA-COLA BOTTLING COMPANY, a corporation;
RODDY MANUFACTURING COMPANY, a corporation;
WESTMINSTER COCA-COLA BOTTLING COMPANY, INC.,
a corporation;
COCA-COLA BOTTLING COMPANY OF KEENE, INC.,
a corporation;
ANN ARBOR COCA-COLA BOTTLING COMPANY,
a corporation;
THE SCIOTO COCA-COLA BOTTLING COMPANY,
a corporation; and
TEXAS COCA-COLA BOTTLING COMPANY, a corporation,
Plaintiffs,

v.

FEDERAL TRADE COMMISSION,
Defendant.

In this action for injunctive and declaratory relief, plaintiffs attack an interlocutory order of the Federal Trade Commission (hereinafter referred to as FTC) entered in an adjudicative proceeding pending before the FTC. Plaintiffs are a soft drink manufacturer, The Coca-Cola

Company, and ten bottling companies who package and distribute its products. Defendant is a regulatory agency of the United States—FTC. Plaintiffs assert that this court has jurisdiction under 28 U.S.C. §1331 (federal question), 28 U.S.C. §1337 (anti-trust), 28 U.S.C. §1361 (mandamus) and 28 U.S.C. §1651 (All Writs Act).

Plaintiffs have moved for a preliminary injunction. Defendant has moved to dismiss the action. On May 3, 1972 this court heard argument on the above motions.

Statement of the Case

Plaintiff, Coca-Cola, is a Delaware corporation with its principal office and place of business in Atlanta, Georgia. Coca-Cola is engaged primarily in the business of manufacturing syrups and concentrates used by over nine hundred (900) contract bottlers in the preparation of soft drink products under its trademarks, including the trademark Coca-Cola. The bottlers, licensed by Coca-Cola to sell in certain geographical areas, mix the concentrate purchased from Coca-Cola, package it in bottles and resell the product. In addition to manufacturing and selling soft drink products, Coca-Cola also operates bottling plants in twenty-six (26) cities and sells soft drink products to retailers in those areas.

Plaintiffs, Coca-Cola Bottling Co. (Thomas), Inc.; Coca-Cola Bottling Works (Thomas), Inc.; and Coca-Cola Bottling Works 3rd, Inc. (hereinafter referred to as Thomas Companies), are Delaware corporations with their principal offices and places of business in Chattanooga, Tennessee. The Thomas Companies are parent bottlers who have operated for many years under contract with Coca-Cola whereby they purchase concentrate from Coca-Cola for resale to numerous bottlers which have obtained licenses from the Thomas Companies to bottle and resell Coca-Cola products within certain geographical territories.

The remaining plaintiffs (hereinafter referred to as FTC Intervenor Bottlers) are corporations organized, ex-

isting and having their principal offices and places of business as follows: Elberton Coca-Cola Bottling Company, Elberton, Georgia; Roddy Manufacturing Company, Knoxville, Tennessee; Westminster Coca-Cola Bottling Company, Inc., Westminster, Maryland; Coca-Cola Bottling Company of Keene, Inc., Keene, New Hampshire; Ann Arbor Coca-Cola Bottling Company, Ann Arbor, Michigan; The Scioto Coca-Cola Bottling Company, Circleville, Ohio; Texas Coca-Cola Bottling Company, Abilene, Texas. The FTC Intervenor Bottlers are engaged in the processing and sale of Coca-Cola products in designated territories pursuant to bottler contracts.

Defendant, FTC, is an administrative agency of the United States charged with, among other things, the duty of investigating, issuing and prosecuting in its adjudicative proceedings alleged violations of the antitrust laws.

On July 15, 1971, the FTC issued an administrative complaint (Docket No. 8855) charging The Coca-Cola Company (hereinafter referred to as Coca-Cola), Coca-Cola Bottling Co. (Thomas), Inc., Coca-Cola Bottling Works (Thomas), Inc. and Coca-Cola Bottling Works 3rd, Inc. with a violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45).[1] Specifically, the administrative complaint[2] charges that, in the course of their business, Coca-Cola and the Thomas Companies have entered into licenses with their bottler customers whereby the bottlers agree not to resell Coca-Cola products outside a designated geographical area, and that such license provisions constitute an unfair method of competition.

1. Section 5(a) provides in part:

(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

* * *

(6) The Commission is hereby empowered and directed to prevail persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

2. The FTC also issued administrative complaints involving seven (7) other soft drink manufacturers, alleging similar theories.

Coca-Cola and the Thomas Companies filed an answer admitting the material facts in the complaint, including the existence of the territorial restrictions; but they denied the alleged violation of law. The FTC Intervenor Bottlers applied for and were granted permission to intervene in the proceeding.

Plaintiffs filed motions to dismiss the administrative complaint in Docket 8855 for failure to join indispensable parties. In their motions, plaintiffs contended that all bottlers licensed to bottle and distribute Coca-Cola products are indispensable parties to the administrative adjudication and therefore must be joined. On March 23, 1972, the FTC denied plaintiffs' motions to dismiss.[3]

Plaintiffs instituted the present action seeking: (1) a declaratory judgment decreeing that the bottlers of plaintiff

3. Plaintiffs initially presented their motions to the hearing examiner who denied them on January 7, 1972. Plaintiffs sought review of the hearing examiner's order by filing an application for permission to file an interlocutory appeal under the FTC's Rules of Practice (16 C.F.R. §3.23) or, in the alternative, to treat the motions as certified to the Commission by the hearing examiner pursuant to FTC's Rules of Practice (16 C.F.R. §3.22). Since the Commission found that the hearing examiner did not have authority to add parties, it dealt with plaintiffs' motions under the latter Rule, stating that:

> The Commission has made a distinction however, between those instances in which the motion to dismiss challenges the Commission's legal power to issue the complaint and those in which it seeks to probe the Commission's discretion or judgment on whether or not a proceeding would be in the public interest. It is only in the latter instance in which the examiner is considered to be without authority to rule. See, *The Drive-X Company, Inc.*, Docket No. 8615, Order Denying Application for Leave to File Interlocutory Appeal, or in the Alternative for an Order Requiring Certification of Question, June 10, 1964. While it is clear that the present situation falls within the former, *i.e.*, the category of cases challenging the Commission's legal authority to issue the complaint, and hence within the examiner's authority to decide, we have nevertheless determined that that question is so intertwined with the question of amending the complaint by the addition of parties that both should have been certified to the Commission. ORDER RULING ON MOTIONS TO DISMISS FOR FAILURE TO JOIN INDISPENSABLE PARTIES, *The Coca-Cola Company, et al.*, Docket No. 8855 (March 23, 1972) at 4.

Coca-Cola and plaintiff Thomas Companies are indispensable to the FTC proceeding challenging the contractual provisions and, the FTC having willfully failed to join them as parties, the complaint therein should be dismissed; and (2) an injunction enjoining the FTC from conducting any further proceedings in Docket 8855 as long as the bottlers are not joined as parties to said proceeding, and, failing that, requiring defendant to dismiss the complaint therein.

Plaintiffs base the requests for relief on the allegations that unless the FTC is enjoined it will proceed with the adjudication without all the bottlers being parties and should the FTC prevail therein with respect to its challenge to the exclusive territorial provisions of the bottlers' contracts:

"(a) Plaintiffs Coca-Cola and the Thomas Companies would be subject to two inconsistent decrees, to wit: the decree of the United States District Court of Delaware[4] and the order of the Federal Trade Commission;

4. Without passing on the merits of this contention the court makes the following comments. In *The Coca-Cola Bottling Co.* v. *The Coca-Cola Co.*, 269 F. 796 (D. Del. 1920) the court considered the legality of a 1894 contract between Coca-Cola and a predecessor to the Thomas Companies. Under that contract, Coca-Cola, which previously had sold syrup only through soda fountains, licensed the distribution of soft drink in bottles and granted exclusive right to establish plants throughout a large part of the United States. In 1919, Coca-Cola and the bottling company had a disagreement concerning a price rise in the cost of syrup. Coca-Cola attempting to unilaterally terminate the contract. The bottling company sued for specific performance. Coca-Cola defended, *inter alia*, on the grounds that the terms of the contract violated federal antitrust laws. The court held that the contract was not terminable at the will of Coca-Cola. The court also held that the various restrictions in the contract were ancillary to the main purpose of the contract which was to develop a system of distributing the soft drink in bottles. Thus, the "territorial provision", whereby Coca-Cola agreed to "select [the bottling company] as its sole and exclusive customer and licensed for the purpose of bottling Coca-Cola in the territory heretofore acquired * * *" (269 F. at 802), was found to be reasonable. However, there is no mention in the case

(footnote continued on next page)

(b) The judicially declared property rights of the bottlers who are not parties, including the rights of said bottlers vis-a-vis other such bottlers, would be altered;

(c) All bottlers must have the opportunity to be heard further in other proceedings in defense of their property rights. As a result thereof, without the presence of the bottlers, Docket 8855 cannot result in effective relief of the kind sought by defendant Commission;

(d) Plaintiffs and the public would also be subject to multiple litigation and would be deprived of the right to a settlement of the dispute by wholes;

(e) The ultimate resolution of the matter will be inordinately delayed;

(f) The proceeding would have to be dismissed or repeated with the bottlers as parties;

(g) Bottlers might be forced out of business."

Plaintiffs contend that a continuation of the proceedings in Docket No. 8855 without the presence of the bottlers as parties will deprive plaintiffs of their rights to due process of law and to basic fairness under the Fifth Amendment to the Constitution of the United States and the Administrative Procedure Act.

Since defendant's motion to dismiss raises the issue of this court's jurisdiction to entertain the present action, the court will deal with it first.

Jurisdiction

Although plaintiffs contend that the present action is a suit for declaratory judgment and injunctive relief to

---

of any provision whereby the bottlers agree not to sell Coca-Cola products outside a certain territory which is the provision under attack in the present FTC proceeding Docket No. 8855. Thus, it would appear that unless such a provision can be inferred from the above quote, the legality of the "territorial provision" under attack in the FTC proceedings was not ruled upon by the Delaware Court.

protect plaintiffs' fundamental rights and to prevent the exercise of engaging in a potentially futile trial, the court believes that it is more appropriately characterized as a collateral suit to review agency action which is procedural in nature. Thus, the court will treat this as an action seeking judicial review of an administrative decision.

Both plaintiffs and defendant concede that the FTC's order denying the plaintiffs' motion to dismiss is reviewable. Therefore, the questions for this court to determine are: first, when is the FTC's action reviewable; and second, by whom is it reviewable? The first question presents the issues of ripeness and exhaustion, while the second question presents the issue of the proper court—District Court or Court of Appeals. In determining the answers to these questions the court will look first to the statutory law and then to the case law.

Statutory Law

Congress has delegated the administration of the Federal Trade Commission Act (15 U.S.C. §41 *et seq*) (hereinafter referred to as the Act) to the FTC. That delegation gives the FTC jurisdiction to institute and conduct adjudicative proceedings whenever it has reason to believe that an unfair method of competition is being used and a proceeding would be in the public interest.[5] If, as a result of such adjudicative proceeding, the FTC finds that there has been an unfair method of competition practiced, it has the power to issue cease-and-desist orders.[6] Section 5(c) of the Act confers jurisdiction to review cease-and-desist orders upon the courts of appeals.[7] That jurisdiction is

5. 15 U.S.C. §45 *et seq*. Docket 8855 is such a proceeding.

6. Plaintiffs do not contest the FTC's authority to conduct adjudicative proceeding dealing with alleged unfair methods of competition. Neither do plaintiffs contest the FTC's authority to issue cease-and-desist orders to prevent such practices.

7. 15 U.S.C. §45(c).

made exclusive by Section 5(d).[8] The Act is silent as to any other type of judicial review. Since no cease-and-desist order has been entered, this court must look elsewhere.

Plaintiffs assert that the Administrative Procedure Act (5 U.S.C. §551 *et seq*) makes such agency action reviewable at this time. The review provision of Section 10 of that Act provides in part:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. 5 U.S.C. §704.

Before determining when the above section makes the FTC's denial of plaintiffs' motions to dismiss reviewable, it is necessary to characterize the denial of a motion to dismiss in an agency adjudication.

Since the agencies frequently refer to the Federal Rules of Civil Procedure to make procedural determinations in their proceedings, the court will use the federal judicial proceedings by way of analogy. In a proceeding before a federal district court the denial of a motion to dismiss is not a final order and therefore is not appealable. 2A Moore's Federal Practice, Section 12.14 at 2338. Thus, a denial of a motion to dismiss is interlocutory in character. Under the Federal Rules of Appellate Procedure, Rule 5(a), appeal of an interlocutory order may be had under certain circumstances. However, Federal Rules of Appellate Procedure, Rule 20, excludes the application of Rule 5 interlocutory appeals from review or enforcement of agency orders. Thus, it would appear that Congress did not provide for any review of interlocutory agency orders in the Federal Rules.

8. 15 U.S.C. §45(d).

Turning now to the review provisions of Section 10 of the Administrative Procedure Act, the first sentence addresses itself to agency action which is reviewable by statute or final in character. The court has determined that the Federal Trade Commission Act does not provide for review of the denial of a motion to dismiss and the court is not aware of any other statutory provision making such action reviewable. The court has characterized the FTC's action as interlocutory rather than final. Thus, the first sentence of Section 10 does not confer the power on this court to review the FTC's action. The second sentence of Section 10 provides for review of "preliminary, procedural, or intermediate agency action" on the review of final agency action. Since interlocutory is synonymous with intermediate, the Administrative Procedure Act provides for review of the FTC's denial of plaintiffs' motion to dismiss only upon review of a cease-and-desist order entered by the FTC as a result of the adjudicative proceeding in Docket 8855. However, such review is in the exclusive jurisdiction of the Court of Appeals. Thus, there is no statutory basis for this court's jurisdiction over the present action. Therefore, if this court has jurisdiction, then it must be conferred by case law.

Case Law

In view of the statutory prescription of judicial review of agency action directly in a court of appeals, district courts ordinarily lack jurisdiction to review agency action. Thus, where Congress has provided an adequate procedure for judicial review of administrative action, that procedure must be followed. Only in extraordinary cases will parties be allowed to deviate from this statutory course and seek injunctive relief from the district court, short-circuiting the administrative procedures. The court agrees with and adopts the reasons for the exhaustion doctrine as stated by Mr. Chief Justice Burger, while a circuit judge, in

Wolf Corp. v. *Securities and Exchange Commission*, 317 F.2d 139 (D.C. Cir. 1963):

> Judicial power to impose prior restraint is not called an extraordinary remedy without reason. Even as between private parties the ordinary remedy is legal action after injury. Prior restraint is granted only upon a strong showing and is subject to definite and well established limitations. Prior restraint against governmental action, regular on its face and under color of authority, is even more cautiously exerted. Still higher hurdles stand in the way of prior restraint against the processes of a regulatory body exercising quasi-judicial powers which can be judicially reviewed as a matter of right before they become final. In this third category the jurisdiction of the regulatory or administrative body is exercised within the framework of a statutory scheme in which it acts as an arm of Congress; moreover it has established patterns of procedure and acts in a context where courts have long acknowledged a considerable deference to the specialized experience and competence of such a body. To exert judicial power to stop processes of this third category, which can always be judicially reviewed when the story is fully told and recorded, is an extraordinary step in the usual as well as the legally artful sense of that word. One who seeks our employment of such powers must make the strongest kind of showing; his jurisdictional "t's" must be crossed and the factual "i's" dotted.
>
> The reasons for this restrained attitude on our part are plain if we look at the whole panorama. When Congress vested broad powers in the Commission it was not unaware of possible risks of misuse or even abuse of those powers by administrators. But except in very unusual and limited circumstances Congress did not contemplate a grant of jurisdiction to the courts to prevent abuse or misuse of power by prior restraint of the exercise of the powers. Instead judicial review after full hearing was accorded. While this

> does not preclude judicial restraint in advance of the administrative process in all circumstances, such relief is to be very sparingly applied and is limited to cases where on its face the contemplated hearing or other administrative process, if consummated, would be set aside on review on procedural grounds. 317 F.2d at 142-43.

There are however cases which recognize very narrow and extraordinary exceptions to the general rule requiring exhaustion of administrative remedies. Plaintiffs contend that the present action falls within the limited exceptions carved out of the exhaustion doctrine by the cases. Although most of the exceptions have been established in labor cases, the principles established are equally as applicable to actions before the FTC.

Myers v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938) established that a district court did not have jurisdiction to enjoin the hearing of a case before, or to review any interlocutory order of, the National Labor Relations Board because Congress had vested the exclusive power of review in the Circuit Courts of Appeal and for the additional reason that "* * * no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers, supra,* at 50, 58 S.Ct. at 463. The *Myers* ruling has consistently been approved and the principle has become well established that a district court does not possess the power to police either the procedural or the substantive purity of a proceeding in progress before an agency. *Bokat* v. *Tidewater Equipment Co.*, 363 F.2d 667 (5th Cir. 1966).

The *Myers* principle is, however, not without exceptions and case law has allowed district court interference in agency proceedings in a few narrowly circumscribed instances, all of which have been thought to be based upon "exceptional circumstances." *Boire* v. *Miami Herald Publishing Company*, 343 F.2d 17 (5th Cir. 1965).

The first exception is where the suit tenders a "public question particularly high in the scale of our national in-

terest because of their international complexion." *McCulloch* v. *Sociedad National de Marineros de Honduras,* 372 U.S. 10, 17, 83 S.Ct. 671, 675, 9 L.Ed. 2d 547 (1963). There the court permitted review of an NLRB election order because of the international overtones involved in the Board's application of the National Labor Relations Act to foreign maritime crews. In the present case, there is no international implication or urgency as there was in *Sociedad National.* Thus, the present action does not fall within this exception.

A second exception to the rule of exhaustion was fashioned by the Second Circuit in *Fay* v. *Douds,* 172 F. 2d 720 (2d Cir. 1949). This exception allows a district court to assert jurisdiction where there has been a substantial showing that agency action has violated the constitutional rights of the complaining party. This exception has only limited application in the Fifth Circuit. See *Boire* v. *Miami Herald Publishing Company,* 343 F. 2d 17, 21 at n. 7 (5th Cir. 1965). Plaintiffs may be attempting to invoke this exception by alleging that by failing to join all the Coca-Cola bottlers as indispensable parties the FTC is denying them due process and basic fairness. The court finds this proposition has no merit. Since a party to a judicial action before a federal district court could not be said to be denied due process by a court's denial of a motion to dismiss for failure to join indispensable parties, the same must hold true for a party to an administrative action. See *Frito-Lay* v. *Federal Trade Commission,* 380 F.2d 8 (5th Cir. 1967).

A third exception was developed by the court in *Leedom* v. *Kyne,* 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed. 2d 210 (1958). There the court permitted review of the NLRB's certification of a bargaining unit which included both professional and nonprofessional employees even though the professional employees had not consented to inclusion in the otherwise nonprofessional unit. This action was in direct defiance of an express provision of the National Labor Relations Act. The District Court, whose judgment was affirmed by the Second Circuit, held that the Board had

acted in excess of its powers and set aside the Board's determination even though it was not a "final order". On appeal the Board contended that the District Court lacked jurisdiction to entertain the suit. In this extreme factual context the Supreme Court held that the District Court had original jurisdiction:

> This suit is not one to "review", in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather, it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act. * * * Plainly, this was an attempted exercise of powers that had been specifically withheld. It deprived the professional employees of a "right" assured to them by Congress. Surely, in these circumstances a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given. 358 U.S. at 188, 89, 79 S.Ct. at 184.

Leedom could easily have opened the doors to the Federal District Courts for numerous attacks on agency action. However the exception created by *Leedom* has remained very narrow. The narrowness of this exception was pointed out by the Fifth Circuit in *United States* v. *Feaster,* 410 F.2d 1354 (5th Cir. 1969):

> * * * *Leedom* v. *Kyne* represents only a narrow and rarely successfully invoked exception to the doctrine that exhaustion of administrative procedures is a condition precedent to federal court jurisdiction. Under this exception access to the courts is accorded only if the Mediation Board's determination is infused with error which is of a *summa* or *magna* quality as contraposed to decisions which are simply *cum* error. Only the egregious error melds the Board's decision into justiciability. Lesser malignancies thwart the jurisdiction of the courts. (cases cited) at 1368.

In the present action there is no statutory prohibition or provision of the Federal Trade Commission Act which the FTC is alleged to have violated. Even if on review by the Court of Appeals it was found that the FTC should have joined all the bottlers as indispensable parties, the FTC's failure to do so is not such an abuse by it that it is obvious on its face that it has acted incorrectly. Even if it was, the court does not believe that this is the kind of agency action protected against by the *Leedom* exception. Accordingly the court finds that the present action does not fall within this exception.

A fourth exception is recognized by the Fourth Circuit. In *Deering-Milliken Inc.* v. *Johnston,* 295 F.2d 856 (4th Cir. 1961), an action was brought pursuant to Section 10(e) of the Administrative Procedure Act [5 U.S.C. §1009(e)] to compel agency action wrongfully withheld. The Court concluded that Section 6(a) of the Administrative Procedure Act [5 U.S.C. §1005(a)] gave the complaining party a "specific statutory right" to have his hearing concluded with reasonable dispatch and that, as judicial review to prevent delay was adequate only through district court intervention, a district court was vested with the power to act. Delay on the part of the agency was considered implicitly to constitute exhaustion of administrative remedies. This exception has no application to the present case since there has been no delay on the part of the FTC.

The court has also considered the other cases relied on by plaintiffs such as: *McKart* v. *United States,* 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed. 2d 194 (1969); *Skinner & Eddy Corp.* v. *United States,* 249 U.S. 557, 39 S.Ct. 375, 63 L.Ed. 772 (1919); *Jewel Company, Inc.* v. *Federal Trade Commission,* 432 F.2d 1155 (7th Cir. 1970); *Davis* v. *Secretary of Health, Education and Welfare,* 386 F.2d 429 (4th Circuit 1967); *Wolf Corp.* v. *Securities Exchange Commission,* 317 F.2d 139 (D.C. Cir. 1963); *The Coca-Cola Company* v. *Federal Trade Commission* (N.D. Ga. 1972), Civil Action No. 15436; *Lehigh Portland Cement Co.* v. *Federal Trade Commission,* 291 F. Supp. 628 (E.D. Va. 1968);

Union Bag-Camp Paper Corp. v. *Federal Trade Commission,* 233 F. Supp. 660 (S.D.N.Y. 1964); *Yanish* v. *Wixon,* 81 F. Supp. 499 (N.D. Cal. 1948). None of these cases creates any new exception or broadens any of the above exceptions.

Thus, this court has been unable to find any case which has broadened the exhaustion doctrine to the point where the denial of a motion to dismiss for failure to join indispensable parties by an administrative agency can amount to the kind of agency action which will create jurisdiction in a Federal District Court to grant review or relief of any kind.

This court has been unable to find jurisdiction in either the statutory law or the case law to entertain the present action. Thus, the answers to the questions before the court as to when review of the FTC action is available and by whom the FTC's action is reviewable, are at the time any cease-and-desist order is reviewed and that review must be by the Court of Appeals.

Accordingly, defendant's motion to dismiss is hereby granted.

IT IS SO ORDERED.

At Atlanta, Georgia, this 16 day of May, 1972.

/s/ RICHARD C. FREEMAN

Richard C. Freeman
United States District Judge

Appendix B—Judgment

Judgment of the District Court (Entered May 17, 1972)

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA
Atlanta Division

Civil Action File No. 16484

THE COCA-COLA COMPANY, a corporation, et al

vs.

FEDERAL TRADE COMMISSION

This action came on for (hearing) before the Court, Honorable Richard C. Freeman, United States District Judge, presiding and the issues having been duly (heard) and a decision having been duly rendered, granting defendant's motion to dismiss,

It is Ordered and Adjudged that the plaintiffs take nothing, that the action be dismissed, and that the defendant, Federal Trade Commission, recover of the plaintiffs, The Coca-Cola Company, a corporation; Coca-Cola Bottling Co. (Thomas), Inc., a corporation; Coca-Cola Bottling Works (Thomas), Inc., a corporation; Coca-Cola Bottling Works 3rd, Inc., a corporation; Elberton Coca-Cola Bottling Company, a corporation; Roddy Manufacturing Company, a corporation; Westminster Coca-Cola Bottling Company, Inc., a corporation; Coca-Cola Bottling Company of Keene, Inc., a corporation; Ann Arbor Coca-Cola Bottling

Company, a corporation; The Scioto Coca-Cola Bottling Company, a corporation; and Texas Coca-Cola Bottling Company, a corporation, its costs of action.

Dated at Atlanta, Georgia, this 17th day of May, 1972.

Claude L. Goza
Clerk of Court

/s/ By: Mary J. Watson
Deputy Clerk

Filed & Entered in Clerk's Office
this 17th day of May, 1972

Claude L. Goza, Clerk

/s/ By: Mary J. Watson
Deputy Clerk

APPENDIX C

Order of the FTC Ruling on Motions to Dismiss for Failure to Join Indispensable Parties (Dated March 23, 1972)

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Commissioners:

Miles W. Kirkpatrick, Chairman
Paul Rand Dixon
Everette MacIntyre
Mary Gardiner Jones
David S. Dennison, Jr.

Docket No. 8853

In the Matter of

CRUSH INTERNATIONAL LIMITED, a corporation; and BEVERAGES INTERNATIONAL INC., a corporation; and CRUSH INTERNATIONAL INC., a corporation.

Docket No. 8854

In the Matter of

DR. PEPPER COMPANY, a corporation.

Docket No. 8855

In the Matter of

THE COCA-COLA COMPANY, a corporation; COCA-COLA BOTTLING CO. (THOMAS), INC., a corporation; COCA-COLA BOTTLING WORKS (THOMAS), INC., a corporation; COCA-COLA BOTTLING WORKS 3RD, INC., a corporation.

Appendix C—Order

Docket No. 8856

In the Matter of

PEPSICO, INC., a corporation.

Docket No. 8857

In the Matter of

THE SEVEN-UP COMPANY, a corporation.

Docket No. 8859

In the Matter of

NATIONAL INDUSTRIES INC., a corporation; and COTT CORPORATION, a corporation.

This matter is before the Commission upon requests for permission to file interlocutory appeals by the respondents in Docket Nos. 8853-8857 and Docket No. 8859, upon complaint counsel's response thereto, filed February 17, 1972, and upon respondent Dr. Pepper Company's response to complaint counsel's reply, filed February 29, 1972.[1] Al-

1. The motions are as follows: Crush International Limited, Docket No. 8853—application for leave to file an interlocutory appeal or to treat motions as certified filed February 4, 1972; Dr. Pepper Company, Docket No. 8854—request for permission to file an interlocutory appeal from the order of the hearing examiner denying respondent's motion to dismiss the complaint for failure to join indispensable parties and for a stay of proceedings, and request for permission to file an interlocutory appeal from the order of the hearing examiner denying respondent's motion to amend the complaint to join the Dr. Pepper Company bottlers as co-respondents filed February 4, 1972. The Coca-Cola Company, Docket No. 8855—application (I) for leave to file interlocutory appeals and (II) to treat motions to dismiss as certified filed January 18, 1972; Pepsico, Inc., Docket No. 8856—application for leave to file interlocutory appeal or to treat

(footnote continued on next page)

though the motions are not identically styled and vary somewhat in the specific relief sought, they nevertheless involve the same question and will therefore be considered together.

D. 8853-8857 and D. 8859

The question arises as a result of complaints issued by the Commission against several soft drink companies challenging the legality of respondents' contracts with their respective bottlers. Respondents take the position that their bottlers are indispensable parties to these proceedings and that absent their joinder the complaints should be dismissed. Motions to this effect were denied by the examiner and these requests for permission to appeal followed. Before considering these requests we will deal with the procedural issues of the examiner's authority to rule on a motion to amend the complaint by the addition of parties to Commission proceedings and his authority to rule on motions to dismiss.

I

The Commission has consistently taken the position that the examiner has no authority to amend a complaint by the addition or deletion of parties except to the extent that his ruling deals with matters of procedure rather than substance such as the deletion of an individual respondent who has deceased or the substitution of respondents improperly named, etc. The same applies to motions to dismiss because both involve the "reason to believe" concept of Section 5 which only the Commission itself can express. Both issues were involved in the *Suburban Propane Gas Corp.* case,

motions as certified filed January 31, 1972; The Seven-Up Company, Docket No. 8857—application for permission to file (1) appeal for de novo consideration of respondent's motion to dismiss, or (2) interlocutory appeal filed January 31, 1972; National Industries, Inc., Docket No. 8859—respondents' request for permission to file interlocutory appeal from the hearing examiner's order denying motion to dismiss the complaint for failure to join indispensable parties filed February 3, 1972.

Appendix C—Order

D. 8853-8857 and D. 8859

Docket No. 8672, Order Ruling on Interlocutory Appeals, May 25, 1967, CCH Trade Reg. Rep. [1967-1970 Transfer Binder] ¶17,965. On the issue to amend the complaint by a joinder of an additional party we there held that it should have been certified to the Commission. As to the motion to dismiss we stated as follows:

> "The examiner recognized that the question involved the administrative discretion in issuing a complaint and that it presented an issue on which he had no authority to rule. Nonetheless, he denied the motion. The matter should have been certified to the Commission with the examiner's recommendation. Section 3.6(a), Commission's Rules of Practice; Drug Research Corp., Docket No. 7179 (October 3, 1962). [Footnote omitted] Respondent, however, has not been prejudiced, since the matter is now before the Commission for *de novo* consideration and determination." at 20,337.

The Commission has made a distinction however, between those instances in which the motion to dismiss challenges the Commission's legal power to issue the complaint and those in which it seeks to probe the Commission's discretion or judgment on whether or not a proceeding would be in the public interest. It is only in the latter instance in which the examiner is considered to be without authority to rule. See, *The Drive-X Company, Inc.*, Docket No. 8615, Order Denying Application for Leave to File Interlocutory Appeal or in the Alternative for an Order Requiring Certification of Question, June 10, 1964. While it is clear that the present situation falls within the former, *i.e.*, the category of cases challenging the Commission's legal authority to issue the complaint, and hence within the examiner's authority to decide, we have nevertheless determined that that question is so intertwined with the question of amending the com-

plaint by the addition of parties that both should have been certified to the Commission.

Although the matter has not been so certified, we are not precluded from considering it, since it is before us upon respondents' request for leave to file interlocutory appeals. A similar procedure was followed in *Maremont Corp.*, Docket No. 8763, Order Denying Respondent's Request to File Interlocutory Appeal and Motion to Dismiss the Complaint or Stay Proceedings, October 3, 1968, CCH Trade Reg. Rep. [1967-1970 Transfer Binder] ¶18,542. There we held as follows:

> "Respondent argues first that the examiner erred in ruling on the motion, which it asserts to be beyond his jurisdiction, and, secondly, that its request is justified on the merits. We agree that the hearing examiner erroneously ruled on the request to dismiss the complaint or stay the proceeding. The motion clearly is addressed to the Commission's administrative discretion and does not concern adjudicative factfinding functions delegated to hearing examiners. *Graber Manufacturing Company, Inc.*, Docket No. 8038 (order issued October 15, 1964). The hearing examiner should properly have certified this part of respondent's motion to the Commission for the Commission's determination and action. Nevertheless, in view of respondent's application for permission to file an interlocutory appeal, the matter is now before the Commission in the same posture as it would have been had the examiner certified it. Accordingly, while our holding is that the hearing examiner erred in failing to certify the motion, this in the circumstances was not to respondent's prejudice and the motion will now be treated as though it has been properly certified." at 20,889.

We will follow this procedure in the instant proceeding. At the same time we will consider the examiner's ruling as

his recommendation to the Commission for the disposition of this matter.

II

The question presented for our decision is whether respondents' bottlers who are parties to the contract being challenged by the complaint are indispensable parties to this proceeding. In essence the position urged upon us by the respondents is that an adjudication of these contracts involves substantial rights of the bottlers who, over the years, have expended goodly sums of money in the development of their business operations in reliance on the terms of their contracts and hence due process requires that they be made a party so that they may be bound by the outcome of this proceeding as well as protect their interests. Respondents are also concerned that the failure of joinder may subject respondents to multiple litigation with their bottlers and result in inconsistent future adjudications. Absent a joinder of the bottlers, respondents ask that the complaints be dismissed.

The examiner's ruling complained of contains the following statements:

> "It is quite apparent that an ultimate decision by the Commission striking the exclusive territorial provisions from the various franchise contracts that the respondents have with their bottlers may very well directly affect substantial property rights these bottlers have acquired and own as a result of their franchise contracts. If a bottler were to lose its exclusive territory within which to sell the respondents' trademarked products, it would be without recourse to sue the respondents for damages or for injunctive relief requiring them to provide the protection against competition from other bottlers who may well invade its

territory. To that extent, therefore, the bottlers may be considered indispensable.

"As a practical matter, however, it is not feasible to join all of the respondents' bottlers as parties to this proceeding. In the first place, the large number of them (1186) would create a completely unmanageable situation for trial purposes. Secondly, it is presumed that a substantial number of such bottlers operate within a small territory within a state, and consequently, may well not be engaged in commerce thereby depriving the Commission of jurisdiction over such bottlers." Order Denying Motion to Dismiss the Complaint for Nonjoinder of Indispensable Parties, January 7, 1972, page 3-4.

The examiner was guided in his decision by Rule 19 of the Federal Rules of Civil Procedure and *Provident Bank* v. *Patterson*, 390 U.S. 102 (1968) a case interpreting the requirements of Rule 19.

Traditionally, of course, antitrust proceedings and decrees have taken little, if any, notice of third parties to any contract held to be in contravention of one of the antitrust laws perhaps because the vindication of public rights, even though they run counter to contractual rights between defendants and third parties, may be accomplished without joining these third parties. This reasoning is advanced by Professor Moore in 3A Moore's Federal Practice, Section 19.10 at 2344. Respondents invite attention to two 1921 proceedings involving this Commission which allegedly support the proposition that the complaint should be dismissed for failure to join indispensable parties. The first is *Fruit Growers' Express Inc.* v. *F.T.C.*, 274 F. 205 (7th Cir. 1921) in which the court vacated a Commission cease and desist order on the ground that the Commission was without jurisdiction because the facts involved common carriers

who are within the sole jurisdiction of the Interstate Commerce Commission. The second is *Sinclair Refining Co.* v. *F.T.C.*, 276 F. 686 (7th Cir. 1921), in which the failure to join what the reviewing court considered to be an indispensable party was advanced as one of the reasons for setting aside an order to cease and desist *after* the court had decided that no violation had been shown. Neither case can be considered a viable precedent for the proposition advanced here. Moreover, a subsequent decision by the same court specifically upheld the Commission's view and with specific reference to these two decisions *Automatic Canteen* v. *F.T.C.*, 194 F.2d 433 (7th Cir. 1952), *rev'd in part on other grounds*, 346 U.S. 61 (1953). Finally, the courts in a procession of decisions have failed to join or otherwise consider indispensable third parties to a contract the legality of which was being challenged under the antitrust laws. See, *United Shoe Machinery Corp.* v. U.S., 258 U.S. 451 (1922); *U.S.* v. *Paramount Famous Lacky Corp.*, 282 U.S. 30 (1930); *Interstate Circuit, Inc.* v. *U.S.*, 306 U.S. 208 (1939); *U.S.* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *U.S.* v. *National Lead Co.*, 332 U.S. 319 (1947); *U.S.* v. *Schine Theatres, Inc.*, 334 U.S. 110 (1948); and *U.S.* v. *International Boxing Club of New York, Inc.*, 171 F. Supp. 841 (S.D.N.Y. 1957), *aff'd* 348 U.S. 242 (1959). The last time this Commission had to consider this question was in *L. G. Balfour Co.*, Docket No. 8435, July 29, 1968, CCH Trade Reg. Rep. [1967-1970 Transfer Binder] ¶19,485 in which it came to the same conclusion. In *Eastman Kodak Co.*, Docket No. 6040, similar arguments were advanced with respect to the challenged resale price maintenance contracts Kodak had with over 6,000 retailers. What we said there is pertinent here:

> "It is true that if an order prohibiting respondent from fixing and maintaining resale prices in accord-

> ance with its agreements with these dealers is issued, it would affect their contractual rights. However, no such prohibition will be issued herein unless the Commission determines that these agreements are in unreasonable restraint of trade and should not be continued. The courts have regularly struck down systems deemed violative of the antitrust laws even though such systems included leases, licenses and other forms of agreements where the other parties thereto were not before the court and where the enjoined covenants were clearly of benefit to said other parties." Order Disposing of Motion to Strike and Respondents' Motion to Dismiss, September 25, 1953.

It is well established, therefore, that third parties to a contract the legality of which is being challenged under the antitrust laws need not be joined in a suit against the first party and are thus not considered indispensable parties. In *National Licorice Co.* v. *N.L.R.B.*, 309 U.S. 350 (1940) the court observed that "in proceedings before the Federal Trade Commission, the order restraining unfair methods of competition may preclude the performance of outstanding contracts by the offender. Such orders have never been challenged because the holders of the contracts were not made parties." at 366. In light of the foregoing we believe respondents' claim that due process requires the joinder of the bottlers as indispensable parties and absent that, a dismissal of the complaints, to be without merit.

Respondents also assert that the failure to join the bottlers may subject respondents to the risks of multiple litigation and inconsistent future adjudications. Our own understanding of the applicable legal principles leads us to conclude that such an eventuality is highly unlikely. A contract which has been declared illegal cannot be enforced by either party.

> "A party to an illegal bargain can neither recover damages for breach thereof nor, by rescinding the bargain, recover the performance that he has rendered thereunder or its value. * * *" *Restatement of Contracts,* Section 598 (1932)

Similarly, supervening illegality renders a contract unenforceable even if it was legal when entered into *Restatement of Contracts,* Section 548. In this regard, administrative proceedings are considered to have the same effect as do statutory provisions.

> "Clearly prevention by an executive and administrative order designed for the benefit of the general public may be considered excusable impossibility whether the order is directed to the general public or to an individual." 6 *Williston on Contracts,* Section 193 (Rev. Ed., 1938).

We turn now to the question of whether, by using Rule 19 of the Federal Rules of Civil Procedure, a different result would be dictated. The Federal Rules of Civil Procedure are not, of course, applicable to administrative agency proceedings which are governed by their own rules of practice. Nevertheless, they can provide an analytical framework for the disposition of related issues. Rule 19(a) provides that:

> "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or

(ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest."

As to (1), it is clear that depending on the outcome, complete relief can be accorded in this proceeding without joining the bottlers. Should the allegations of the complaint be upheld, the relief sought by the order, the termination of the exclusive territorial contracts, can be accomplished by an order to cease and desist naming the presently named respondents. The second part of Rule 19(a) is divided into two parts—an unprotected interest and a substantial risk of incurring inconsistent obligations in relation to that interest. If, however, that interest is not a legally protected one, as for example rights pursuant to a contract declared illegal under the antitrust laws, it cannot serve as a basis for joinder of allegedly indispensable parties. The fact that a contract may have previously not been illegal does not alter this result. The Commission was created for, among others, the purpose of prohibiting hitherto unchallenged trade restraints. *F.T.C.* v. *Sperry & Hutchinson Co.*, —— U.S. —— 1972. As for the risk of incurring inconsistent obligations due to the failure to join the bottlers, Rule 19 requires that risk to be substantial before it will be considered as a reason for a joinder of additional parties. As we have mentioned above, that risk cannot be considered substantial. Our review of the applicable case law convinces us that the bottlers are not indispensable parties within the meaning of Rule 19. See, *e.g.*, *Bennie* v. *Pastor*, 393 F.2d 1 (10th Cir. 1968), citing *Shields* v. *Barrow*, 58 U.S. (17 How.) 129 (1854) and *Provident Bank* v. *Patterson*, 390 U.S. 102 (1968); *Chiodo* v. *General Waterworks Corp.*, 380 F.2d 860 (10th Cir. 1967), *cert. denied*, 389 U.S. 1004; *Stevens* v. *Loomis*, 334 F.2d 775 (1st Cir. 1964).

III

One final aspect of this matter need be considered. In its request, the Coca-Cola Company points to *The Coca-Cola Bottling Co.* v. *The Coca-Cola Co.*, 269 F. 796 (D. Del. 1920) as supportive of its position. There, in a dispute over the contract, the court found these exclusive territorial contracts to be lawful and as not "having an effect or intended to have an effect to defeat or lessen competition or to encourage or tend to create a monopoly, nor do I find anything therein that may be said to be in unreasonable restraint of trade." at 814. We have carefully reviewed that decision and conclude that it does not support respondent Coca-Cola's position.

IV

A number of the respondents have requested the opportunity for oral argument. Under the circumstances, we do not believe that an oral argument would serve any useful purpose. Accordingly,

It Is Ordered that the motions to dismiss for failure to join indispensable parties be, and they hereby are, denied.

By the Commission.

/s/ Charles A. Tobin

Charles A. Tobin
Secretary

SEAL

Issued: March 23, 1972

APPENDIX D

Order of the FTC Administrative Law Judge Denying Motion to Dismiss the Complaint for Nonjoinder of Indispensable Parties (Dated January 7, 1972)

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Docket No. 8855

In the Matter of

THE COCA-COLA COMPANY, a corporation;
COCA-COLA BOTTLING CO. (THOMAS), INC., a corporation;
COCA-COLA BOTTLING WORKS (THOMAS), INC., a corporation;
COCA-COLA BOTTLING WORKS 3RD, INC., a corporation.

The four Coca-Cola respondents have filed motions to dismiss the complaint for nonjoinder of all of the respondents' bottlers who purchase respondents' syrup and prepare soft drinks for distribution in an exclusive territory assigned by contract to each bottler. The basis for respondents' motions is that each bottler has been granted exclusive territorial rights for the bottling and sale of Coca-Cola trademarked products. They further contend that each bottler has acquired a substantial and perpetual property right in its exclusive territory as a result of their franchise contracts with the respondents and that the various bottlers in reliance upon the franchise contracts have invested many millions of dollars over the years in plant and equipment and in creating, developing and maintaining markets for those trademarked products. Respondents further contend that as a result of the United States District Court decision

in *The Coca-Cola Bottling Co.* v. *The Coca-Cola Co.*, 269 F. 796 (D. Del. 1920), which declared the rights granted the bottlers by the contracts to be "property rights" and "perpetual" and that nothing in the contracts were in unreasonable restraint of trade and that the restrictions were merely ancillary to lawful agreements is a binding ruling fixing the bottlers' rights and the respondents' duties under the contract. The respondents further contend that without the provisions in the franchised contracts challenged herein, many of the bottlers would be forced out of business and that elimination of such contractual rights and obligations by the Commission would deprive the bottlers of their property rights without compensation and that respondents would be subject to the peril of inconsistent decrees and the threat of multiple litigation. In addition, the parties to the contracts would be denied the right to complete relief as quickly as possible. Consequently, the respondents urge that the bottlers are indispensable parties and failure to join them herein is unfair and a deprivation of the rights of respondents and of said bottlers to due process of law.

Counsel in support of the complaint have filed an answer opposing the respondents' motion to dismiss.

Counsel for the respondents and in support of the complaint all agree that while the Federal Rules of Civil Procedure are not binding upon the hearing examiner or the Commission, Rule 19 of such Rules supply a practical framework within which to arrive at a decision on the questions presented by the respondents' motions.

Rule 19, in pertinent part, provides as follows:

Rule 19. *Joinder of Persons Needed for Just Adjudication.*

(a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter

of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) *Determination by Court Whenever Joinder not Feasible.* If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

It is quite apparent that an ultimate decision by the Commission striking the exclusive territorial provisions from the various franchise contracts that the respondents have with their bottlers may very well directly affect substantial property rights these bottlers have acquired and

own as a result of their franchise contracts. If a bottler were to lose its exclusive territory within which to sell the respondents' trademarked products, it would be without recourse to sue respondents for damages or for injunctive relief requiring them to provide the protection against competition from other bottlers who may well invade its territory. To that extent, therefore, the bottlers may be considered indispensable.

As a practical matter, however, it is not feasible to attempt to join all of the respondents' bottlers as parties to this proceeding. In the first place, the large number of them (1186) would create a completely unmanageable situation for trial purposes. Secondly, it is presumed that a substantial number of such bottlers operate within a small territory within a state, and consequently, may well not be engaged in commerce, thereby depriving the Commission of jurisdiction over such bottlers.

In *Provident Bank* v. *Patterson*, 390 U.S. 102 (1967), the Supreme Court considered the present revised Rule 19. In that case, after a verdict had been obtained in the District Court, the Circuit Court of Appeals dismissed the action on the ground that an indispensable party had not been made a party to the action. The question of indispensable parties was raised for the first time in the Circuit Court of Appeals. The Supreme Court reversed, since the Circuit Court failed to "follow the provision of Rule 19 of the Federal Rules of Civil Procedure that findings of 'indispensability' must be based on stated pragmatic considerations" (at p. 106). The Supreme Court held that the question of indispensable party was not a substantive right unaffected by the Federal Rules of Civil Procedure. The Court pointed out that the principal consideration is whether or not it is "feasible" to join a party and that the decision of whether or not to join a party pursuant to Rule 19 requires the applying of the equity and good conscience test of Rule 19(b) (at p. 109).

Appendix D—Order

In a number of antitrust cases, it has been recognized by the Supreme Court that the courts possess the power to strike down "systems deemed violative of the anti-trust laws even though such systems include leases, licenses, and other forms of agreements, and the lessees, licensees, and other parties to the agreements (are) not before the Court." *U.S.* v. *National Lead Co.*, 63 F. Supp. 513, 525 n. 8 (S.D.N.Y. 1945), affirmed, 332 U.S. 319 (1947). See also, *National Licorice Co.* v. *N.L.R.B.*, 309 U.S. 350 (1940).

Seven of the respondents' bottlers have recently moved to intervene as interested parties in this proceeding. This motion to intervene has been granted by the hearing examiner. It was not granted on a limited basis but with full right of counsel for the intervenors to participate in the hearings including the right to object to evidence, cross-examine witnesses and proffer evidence as well as the filing of proposed findings and briefs at the conclusion of trial. While these intervenors were not made parties to the proceeding the bottlers will have their rights, to the extent that they may differ from the respondents' rights, fully represented during the course of the hearings.

Consequently,

It Is Ordered that the respondents' motion to join all of their bottlers as being indispensable parties to this proceeding is hereby denied.

/s/ Andrew C. Goodhope

Andrew C. Goodhope
Hearing Examiner

January 7, 1972

APPENDIX E

Constitutional Provisions, Statutes and Rules Involved

United States Constitution

Amendment V—Capital Crimes: Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Judicial Code

28 U.S.C. §1331(a). Federal question; amount in controversy; costs

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1337. Commerce and anti-trust regulations

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

28 U.S.C. §1361. Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer

or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. §1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

ADMINISTRATIVE PROCEDURE ACT

5 U.S.C. §704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. §706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

FEDERAL TRADE COMMISSION ACT

15 U.S.C. §45. Unfair methods of competition unlawful; prevention by Commission—Declaration of unlawfulness; power to prohibit unfair practices.

(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or

requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provided that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person or advertising offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers,

or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carrriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 227(a) of Title 7, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

Proceeding by Commission; modifying and setting aside orders

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding, by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel in person. The testimony in any such proceeding shall be re-

duced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41-46 and 47-58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission, may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

Review of order; rehearing

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may

obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act of practice in question was used or where such person, partnership, or corporation resides or carried on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court of the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting

aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28.

Jurisdiction of court

(d) Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

Precedence of proceedings; exemption from liability

(e) Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

Service of complaints, orders and other processes; return

(f) Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said

service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed registered mail or by certified mail as aforesaid shall be proof of the service of the same.

Finality of order

(g) An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the Court of Appeals, and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the Court of Appeals; or

(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.

Same; order modified or set aside by Supreme Court

(h) If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such

thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

Same; rehearing upon order or remand

(j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

Definition of mandate

(k) As used in this section the term "mandate," in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

Penalty for violation of order

(l) Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect shall be deemed a separate offense.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 19. Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he had not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to

the pleader, of any persons as described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

FEDERAL TRADE COMMISSION
RULES OF PRACTICE

16 C.F.R. §3.22. Motions

(a) Presentation and disposition. During the time a proceeding is before an Administrative Law Judge, all motions therein, except those filed under §3.42(g), shall be addressed to the Administrative Law Judge, and if within his authority shall be ruled upon by him. Any motion upon which the Administrative Law Judge has no authority to rule shall be certified by him to the Commission with his recommendation. All written motions shall be filed with the Secretary of the Commission and all motions addressed to the Commission shall be in writing.

(b) Content. All written motions shall state the particular order, ruling, or action desired and the grounds therefor.

(c) Answers. Within ten (10) days after service of any written motion, or within such longer or shorter time as may be designated by the Administrative Law Judge or the Commission, the opposing party shall answer or shall be deemed to have consented to the granting of the relief asked for in the motion. The moving party shall have no right to reply, except as permitted by the Administrative Law Judge or the Commission.

(d) Motions for extensions. As a matter of discretion, the Administrative Law Judge or the Commission may waive the requirements of this section as to motions for extensions of time, and may rule upon such motions ex parte.

(e) Rulings on motions for dismissal. When a motion to dismiss a complaint or for other relief is granted with the result that the proceeding before the Administrative Law Judge is terminated, the Administrative Law Judge shall file an initial decision in accordance with the provision of §3.51. If such a motion is granted as to all charges of the complaint in regard to some, but not all, of the respondents, or is granted as to any part of the charges in regard to any or all of the respondents, the Administrative Law Judge shall enter his ruling on the record and take it into account in his initial decision. When a motion to dismiss is made at the close of the evidence offered in support of the complaint based upon an alleged failure to establish a prima facie case, the Administrative Law Judge may, if he so elects, defer ruling thereon until the close of the case for the reception of evidence.

16 C.F.R. §3.23. Interlocutory appeal

Rulings of the hearing examiner on motions may not be appealed to the Commission prior to appeal from the initial decision except in the following circumstances:

(a) *Appeals without a determination by the hearing examiner.* The Commission may, in its discretion, entertain interlocutory appeals where a ruling of the hearing examiner: (1) Requires the disclosure of Commission records or the appearance of an official or employee of the Commission pursuant to §3.36; (2) requires the appearance of other Government officials pursuant to §3.37; (3) suspends an attorney from participation in a particular proceeding pursuant to §3.42(d); or (4) grants or denies an application for intervention pursuant to the provisions of §3.14. Appeal from such a ruling may be sought by filing with the Commission an application for review, not to exceed fifteen (15) pages, within five (5) days after notice of the hearing examiner's ruling. Answer thereto may be filed within five (5) days after service of the application for review. The application for review should specify the person or party taking the appeal; should designate the ruling or part thereof from which appeal is being taken; and should specify

under which provisions hereof review is being sought. The Commission upon its own motion may enter an order staying the return date of an order issued by the hearing examiner pursuant to §3.36 or §3.37 or placing the matter on the Commission's docket for review. Any order placing the matter on the Commission's docket for review will set forth the scope of the review and the issues which will be considered and will make provision for the filing of briefs if deemed appropriate by the Commission.

(b) *Appeals upon a determination by the hearing examiner.* Except as hereinbefore provided in paragraph (a) of this section applications for review of a ruling by the hearing examiner may be allowed only upon request made to the examiner and a determination by the examiner in writing, with justification in support thereof, that the ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy. Application for review in writing may be filed, not to exceed fifteen (15) pages, within five (5) days after notice of the hearing examiner's determination. Answer thereto may be filed within five (5) days after service of the application for review. The Commission may thereupon, in its discretion, permit an appeal. Commission review, if permitted, will be confined to the application for review and answer thereto, without oral argument or further briefs, unless otherwise ordered by the Commission.

(c) *Proceedings not stayed.* Application for review and appeal hereunder shall not stay proceedings before the hearing examiner unless the examiner or the Commission shall so order.

LIBRARY
SUPREME COURT, U. S.

Nos. 72-1420, 72-1422 and 72-1594

JUN 13 1973

In the Supreme Court of the United States

OCTOBER TERM, 1972

PEPSICO, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, ET AL.

PEPSI-COLA BOTTLING COMPANY OF CORVALLIS, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, ET AL.

THE COCA-COLA COMPANY, COCA-COLA BOTTLING CO., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND THE FIFTH CIRCUITS

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1420

PEPSICO, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, ET AL.

No. 72-1422

PEPSI-COLA BOTTLING COMPANY OF CORVALLIS, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, ET AL.

No. 72-1504

THE COCA-COLA COMPANY, COCA-COLA BOTTLING CO., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND THE FIFTH CIRCUITS

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

STATEMENT

In each of these three cases, the question is whether the courts properly refused to enjoin the Federal Trade Commission from conducting an administrative proceeding because of the agency's failure to include as respondents allegedly indispensable parties.

The two Commission complaints involved in these cases charged that a manufacturer of soft drinks had imposed illegal territorial restrictions upon its bottlers, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The complaint in one case (*PepsiCo*) named only the manufacturer as a respondent; the complaint in the other case (*Coca-Cola*) also named three licensees. Neither complaint named the bottlers. The Commission, however, permitted all bottlers who sought to intervene to do so. The claim is that the Commission also was required to include the several hundred bottlers of each manufacturer as parties, and that its failure to do that so infected the administrative proceedings as to require the courts to enjoin the agency.

1. The Commission's complaint againt PepsiCo, the manufacturer of Pepsi-Cola, was filed in July 1971 (Pet. No. 72-1420, App. 3a). The Commission permitted three bottlers of the drink and a trade association, whose membership included 512 of the 513 bottlers of Pepsi-Cola, to intervene (*id.*, 4a). PepsiCo moved to dismiss the Commission proceeding on the ground that the other bottlers were indispensable parties. The administrative law judge and the Commission denied the motion (*id.*, Apps. C and D).

PepsiCo then filed suit in the United States District Court for the Southern District of New York to enjoin further Commission proceedings unless all bottlers were

made parties (*id.*, 5a). Petitioner in No. 72-1422, Pepsi-Cola Bottling Company of Corvallis, which had not intervened in the administrative proceedings, intervened in the district court in support of PepsiCo (*id.*, 4a, 6a). The district court denied a preliminary injunction and dismissed the complaint, holding that (*id.*, 35a):

> the Commission's denial of the motion to dismiss for non-joinder is not in the nature of a final order and therefore, under the applicable statutes, it cannot be reviewed by the federal courts at this stage of the proceedings.

A divided Court of Appeals for the Second Circuit affirmed. In an opinion by Judge Friendly, the court noted that the Commission would entertain additional applications to intervene by other bottlers, and it ruled that "the four intervenors and other bottlers who may reasonably apply will receive from the FTC all those rights 'provided by law' that are essential to a fair hearing. 16 C.F.R. §3.14" (*id.*, 8a). Although assuming *arguendo* that judicial intervention might be proper if the agency were acting plainly beyond its jurisdiction, the court concluded that petitioners had not "brought themselves within the possibly over-generous principle with respect to reviewability that we have put forward" (*id.*, 13a).

PepsiCo contended that the bottlers were indispensable parties because a Commission order directing it to cancel the territorial restrictions on the franchisees' marketing areas might subject it to liability in a suit by a bottler whose theretofore exclusive territory had been invaded by another. The court rejected this contention (*id.*, 14a):

> The proposition that a court would hold one person liable for doing something within the United States which a federal administrative agency, acting

within its jurisdiction, has found to be necessary for the enforcement of a federal regulatory statute arouses some astonishment. This is particularly so in a context where the persons who would seek to enforce liability know of the proceeding and have had an opportunity to intervene before the agency "in order to safeguard their interests." *Consolidated Edison Co.* v. *NLRB, supra,* 305 U.S. at 234.

2. The *Coca-Cola* case, No. 72-1504, is similar. The Commission permitted intervention requested by seven bottlers, but refused to join all the bottlers as parties (Pet. No. 72-1504, App. 2a). The Coca-Cola Company and bottlers of Coca-Cola filed suit in the United States District Court for the Northern District of Georgia to enjoin the Commission proceedings unless all the bottlers were made parties. The district court dismissed the suit, and the Court of Appeals for the Fifth Circuit affirmed (*id.,* 3a). That court held that any defect in the Commission's proceeding resulting from failure to join necessary parties did not warrant an exception to "the tightly circumscribed exceptions to 'the long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.' *Myers* v. *Bethlehem Shipbuilding Corp.,* 30 U.S. 41, 50-51 (1938)" (*id.,* 3a).

ARGUMENT

Both courts of appeals below correctly refused to enjoin the Commission's administrative proceedings on the basis of the claim that the agency had failed to join necessary parties. If the claim has any merit, it can be fully litigated on judicial review of any order the Commission ultimately may issue. There is no occasion

to interrupt the administrative proceedings at their threshold to litigate this collateral issue.[1]

The theory upon which the manufacturers are attempting to halt the Commission proceedings is the possibility that they might be subjected to liability as a result of a Commission order that would cancel the existing territorial limitations in their franchise agreements and, contrary to those agreements, would permit bottlers to sell in each other's territory. As the Second Circuit held, however, this possibility is too remote to justify at this time judicial intervention in the administrative proceedings. "The agency may find in favor of the respondent; the case may be settled; the reviewing court * * * will be in a better position to assess the matter when all the cards have been played" (Pet. No. 72-1420, App. 9a-10a). See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *United States* v. *Los Angeles & S.L.R.R.*, 273 U.S. 299, 309-310. Moreover, as that court also pointed out, there is little practical likelihood that "a court would hold one person liable for doing something within the United States which a federal administrative agency, acting within its jurisdiction, had found to be necessary for the enforcement of a federal regulatory statute" (*id.*, 14a). See *National Licorice Co.* v. *National Labor Relations Board*, 309 U.S. 350, 365; *Paramount Famous Lasky Corp.* v. *United States*, 282 U.S. 30; *Paramount Famous Lasky Corp.* v. *National Theatre Corp.*, 49 F. 2d 64 (C.A. 4).

It is also contended that the bottlers' interests themselves may be prejudiced by a Commission order direct-

---

[1] In *The Seven-Up Company* v. *Federal Trade Commission*, No. 72-1680, decided May 31, 1973, the Court of Appeals for the Eighth Circuit recently similarly refused to enjoin a companion Commission proceeding involving another soft drink manufacturer.

ing the manufacturers to terminate the territorial restrictions. The Commission, however, permitted those bottlers who sought to intervene to do so, and it will entertain requests for intervention by others. Such intervention would fully protect the interests of any other bottlers who believe that their position is not now being adequately presented.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1973.

DOJ-1973-06

SUPREME COURT, U. S
FILED
JUN 20 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

Docket No. 72-1504

THE COCA-COLA COMPANY, *et al.*,
Petitioners,

against

FEDERAL TRADE COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

Of Counsel:
CHARLES L. GOWEN
EDWARD WOLFE
WILLIAM A. CLINEBURG, JR.
MARIO DIAZ-CRUZ III
KING & SPALDING, Esqs.
WHITE & CASE, Esqs.

THOMAS KIERNAN
Attorney for Petitioner
The Coca-Cola Company
14 Wall Street
New York, New York 10005

GORDON B. SPIVACK
Attorney for Petitioners Coca-Cola Bottling Co. (Thomas), Inc., Coca-Cola Bottling Works (Thomas), Inc., Coca-Cola Bottling Works 3rd, Inc.
25 Broadway
New York, New York 10004

Of Counsel:
J. GUY BEATTY, JR.
LORD, DAY & LORD, Esqs.
MILLER, MARTIN, HITCHING, TIPTON, LENIHAN & WATERHOUSE, Esqs.

RANDOLPH W. THROWER
Attorney for Petitioners Elberton Coca-Cola Bottling Company, Roddy Manufacturing Company, Westminster Coca-Cola Bottling Company, Coca-Cola Bottling Company of Keene, Inc., The Scioto Coca-Cola Bottling Company, and Texas Coca-Cola Bottling Company
3100 First National Bank Tower
Atlanta, Georgia 30303

Of Counsel:
WILLIAM M. HAMES
SUTHERLAND, ASBILL & BRENNAN, Esqs.

TABLE OF CONTENTS

	PAGE
Discussion in Reply	1
Conclusion	3

IN THE

Supreme Court of the United States

October Term, 1972

Docket No. 72-1504

THE COCA-COLA COMPANY, *et al.*,

Petitioners,

against

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

Discussion in Reply

The purported Opposition to the Petition for Certiorari elected not to respond separately to the Petition in this case. Rather, it lumped together the response to the Petitions in this case and the PepsiCo case.

The apparent justification for such an approach would be the understandable one of furthering the convenience of this Court.

The effect, however, is to conceal the actual lack of response to the Petition in this case. The result is also the adoption by Respondent of the extraordinary proposition that the time for determining when parties must be joined in an administrative proceeding is after the proceeding is over.

Thus, Respondent in substance:

A. Ignores the fact that failure of this Court to rule now would frustrate public policy behind an accepted judicial doctrine, specifically that indispensable parties must be determined at an early stage of a proceeding in the interest of the court, the parties, the public and third persons affected thereby, since delay would tend to defeat the purposes of that policy. (Petition pp. 15-19).

B. Ignores the fact that the decision below is in direct conflict with the applicable decisions of this Court in which this Court went to great pains to establish the standards for review of administrative action by the courts when, as here, no administrative expertise is put in issue. (Petition pp. 10-15). Respondent does not deny that no administrative expertise is put in issue.

C. Ignores the fact that deferral will help disrupt an entire industry. (Petition pp. 19-21).

The Opposition also misstates (p. 5) the grounds upon which Petitioners herein have relied. (Petition *passim*). And it advocates in substance that the rights of the *parties* may depend upon whether some independent third persons elect to intervene.

Conclusion

It is respectfully submitted that either Respondent's failure to respond should be deemed an admission, or that it should not be permitted to avoid the issues by such tactics, that attention should be given to the Petition in this case and that the Petition be granted.

Respectfully submitted,

THOMAS KIERNAN
Attorney for Petitioner
The Coca-Cola Company
14 Wall Street
New York, New York 10005

Of Counsel:
CHARLES L. GOWEN
EDWARD WOLFE
WILLIAM A. CLINEBURG, JR.
MARIO DIAZ-CRUZ III
KING & SPALDING, Esqs.
WHITE & CASE, Esqs.

GORDON B. SPIVACK
Attorney for Petitioners Coca-Cola Bottling Co. (Thomas), Inc., Coca-Cola Bottling Works (Thomas), Inc., Coca-Cola Bottling Works 3rd, Inc.
25 Broadway
New York, New York 10004

Of Counsel:
J. GUY BEATTY, JR.
LORD, DAY & LORD, Esqs.
MILLER, MARTIN, HITCHING, TIPTON, LENIHAN & WATERHOUSE, Esqs.

RANDOLPH W. THROWER
Attorney for Petitioners Elberton Coca-Cola Bottling Company, Roddy Manufacturing Company, Westminster Coca-Cola Bottling Company, Coca-Cola Bottling Company of Keene, Inc., The Scioto Coca-Cola Bottling Company, and Texas Coca-Cola Bottling Company
3100 First National Bank Tower
Atlanta, Georgia 30303

Of Counsel:
WILLIAM M. HAMES
SUTHERLAND, ASBILL & BRENNAN, Esqs.